UNITED
NATIONS

A

General Assembly

Distr.
GENERAL

A/CN.9/SR.634
10 May 1999

ORIGINAL: ENGLISH

UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Thirty-first session

SUMMARY RECORD OF THE 634th MEETING

Held at Headquarters, New York,
on Tuesday, 2 June 1998, at 10 a.m.

Chairman: Mr. MAZILU (Romania)

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PRIVATELY FINANCED INFRASTRUCTURE PROJECTS (continued)

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Any corrections to the records of the meetings of this session will be consolidated in a single corrigendum, to be issued shortly after the end of the session.

98-80721 (E)

The meeting was called to order at 10.15 a.m.

PRIVATELY FINANCED INFRASTRUCTURE PROJECTS (continued) (A/CN.9/444 and Add.1 and 2)

1. The CHAIRMAN invited members to comment on paragraphs 62 to 82 of document A/CN.9/444/Add.1.

2. Ms. GÜRAY (Observer for Turkey) said that, in prior discussions of the section on parties involved in infrastructure projects, it had been suggested that the section should be shortened or some of the paragraphs combined. However, since multiple parties could be involved, it seemed unwise to leave anything out of the guidelines, given the complexity of the subject.

3. Mr. KOVAR (United States of America) said that, although the aim in the document had been to be thorough, the key points risked being submerged in the wealth of background information provided. The essential point was that most privately financed infrastructure projects were financed by limited recourse loans, where repayment was primarily assured by the revenue generated by the project itself. Paragraphs 72, 73 and 74, which contained the essential points, should perhaps come first, followed by a discussion of that type of financing and of how such loans might be structured.

4. It should also be made clear that Governments' choices of legal and regulatory schemes would affect the ability to attract that type of financing, and that Governments' primary goal was to procure infrastructure at a reasonable cost, without stressing such collateral benefits as employment. Other members had mentioned that paragraph 65 was ambiguous, yet it contained an essential description of the risks faced by project sponsors, and its deletion would make it more difficult for national and local authorities to understand those risks.

5. The CHAIRMAN invited members to comment on paragraphs 91 to 110.

6. Mr. WALLACE (United States of America) said, with regard to paragraph 98, that competitive proposals might be involved even in projects to provide services rather than infrastructure.

7. Mr. LALLIOT (France) said that, while he agreed with the substance of paragraphs 98, 100, 102 and 108, the terminology used presented some problems, he had submitted some possible drafting alternatives to the Secretariat. There was a contradiction between paragraphs 107 and 60, as Government subsidies could also be a source of funds. It would therefore be preferable to speak of the "principal" rather than the "sole" source of funds.

8. Ms. GIOIA (Italy) said that the reference to the selection of a concessionaire (para. 98) presupposed that a competitive tender would always be carried out. However, in cases involving exclusive rights to technology, Italian law, like that of many other countries, did not allow such an approach. It would also be useful to develop a special procedure for transferring such exclusive rights at the end of a project (paras. 109 and 110). The adoption of

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more precise terminology regarding patents and know-how would be useful for Governments.

9. Mr. CHOUKRI (Observer for Morocco) said that the selection of a concessionaire was the most important phase of a project. The host Government should be able to establish equitable, fair procedures, in accordance with the UNCITRAL Model Law on Procurement, to which a reference should be made in paragraph 98. The paragraph confined itself to the action of the host Government and the private sector, but the judiciary might also be involved in the bidding process, since international and local norms intended to guarantee transparency also allowed investors to have recourse to the courts.

10. Mr. LALLIOT (France), referring to the extension of existing concessions (para. 109), said that in France, concessions to build and operate highways had been awarded through contracts, many of which would soon expire. The duration and projected return on investment of such concessions had been miscalculated. The decision to extend the relevant contracts or to take a different approach was also influenced by the requirements of membership in the European Union. The economic and financial stakes were high, and his Government would be looking to the Commission for guidance on how to proceed, as would others in similar situations.

11. Mr. ESTRELLA FARIA (International Trade Law Branch) noted that the purpose of the chapter under consideration was to provide a brief overview of the issues. The questions raised by the representatives of Morocco and France would be considered in greater detail during the discussion of chapter III. The content of paragraph 109 should also be taken as descriptive rather than prescriptive.

12. Ms. NIKANJAM (Islamic Republic of Iran) said that more detailed criteria for technology transfers and the training of local personnel for BOT projects, which were very important for ensuring a proper transition, should be spelled out in paragraph 110.

13. Mr. ESTRELLA FARIA (International Trade Law Branch) said that the point raised by Iran would be addressed later, in the discussion of the chapter on project agreements.

14. Mr. OLIVENCIA RUIZ (Spain) said that his delegation was aware that the section under consideration should be seen as descriptive rather than prescriptive, but shared the difficulties with terminology noted by the representative of France. It would be best to avoid the use of terms that could lead to confusion, and to limit the text to describing procedures. Each country could then formulate terminology appropriate to its national context.

15. The CHAIRMAN invited the Commission to consider the legislative recommendations in the first section of document A/CN.9/444/Add.2, in conjunction with the notes contained in the second section.

Recommendation 1 on constitutional issues (paras. 1 to 4 of the notes)

16. Mr. WALLACE (United States of America) said that the recommendations must enunciate concise principles that were suitable for use by legislators or as a basis for legislation. With regard to the recommendation on constitutional issues, the authority to enter into privately financed infrastructure arrangements, requiring a minimum of further Government approvals and making possible provision for inter-agency coordination of such approvals, was needed in order to reflect best practices. Governments must be as free as possible to act. It would be more appropriate for individual legislatures to study potential obstacles to the process as they arose than for the Commission to attempt to examine each and every obstacle.

17. Ms. ALLEN (United Kingdom) said that she had some difficulty with paragraph 2 of the notes and, specifically, with the reference to "constitutional provisions". A legislative review was of fundamental importance, and particular attention must be paid to the powers of local authorities to enter into contracts, and to the relationship between central and local government bodies, since lenders often needed to be convinced that local bodies were in fact able to enter into contracts. The ideas on administrative coordination expressed in paragraphs 22 and 23 of the notes should perhaps appear earlier in the text. The first step, however, was to review existing legislation at all levels to determine what gaps needed to be filled.

18. Ms. NIKANJAM (Islamic Republic of Iran), referring to paragraphs 1 and 2 of the notes on legislative recommendations, said that, while some constitutions might not place any restrictions on the participation of the private sector in infrastructure development, some might contain restrictions that applied to foreign investment. It was therefore necessary to add a sentence indicating that paragraphs 1 and 2 related to foreign investment in the host country.

19. Mr. ESTRELLA FARIA (International Trade Law Branch) said that paragraphs 1 and 2 had been drafted in such a way that constitutional restrictions could apply to anyone. The question of restrictions on foreign investment was taken up in a later recommendation.

20. Mr. OLIVENCIA RUIZ (Spain), referring to legislative recommendation 1 on constitutional issues, said that the formulation "it is advisable to review existing constitutional provisions" was too diplomatic. It was necessary to determine whether there were any constitutional restrictions on a project before considering other legislation that might pose obstacles to private sector participation in infrastructure development.

21. The Spanish version of the recommendation, after stating that it was advisable to review existing constitutional provisions, included the phrase "con miras a su eventual revisión" ("with a view to their possible revision"), which did not appear in the English and French texts. He proposed that the other language versions should be aligned with the Spanish text.

22. Ms. MUSOLINO (Australia), referring to paragraph 2 of the notes, said that the issue of reviewing constitutional provisions had been widely considered in many countries. Her delegation was therefore in favour of a more hortatory

drafting of the paragraph. Paragraph 2 should refer not only to constitutional provisions but also to national policies and practices that affected foreign investment.

23. Mr. AL-NASSER (Observer for Saudi Arabia) said that his delegation supported the comments made by the representative of the United Kingdom. Most, if not all, of the delegations participating in the current session would endeavour to coordinate their national legislation with the guide. Once the draft guide was adopted, Saudi Arabia would consider making the requisite changes in its national legislation. His delegation had taken due note of all the comments that had been made and would transmit them to the competent authorities in his country.

24. Mr. CHOUKRI (Observer for Morocco) said that the last sentence of paragraph 4 of the notes on legislative recommendations might be interpreted as requiring States to bring their constitutions into harmony with the guide. Such a requirement would be tantamount to interference in a State's internal affairs and an encroachment on its sovereignty. For that reason, he proposed that the last sentence of paragraph 4 should be deleted.

25. Mr. ESTRELLA FARIA (International Trade Law Branch) said that the last sentence of paragraph 4 was not hortatory but merely historical. It was not questioning the authority of the State to grant concessions; rather, it concerned related provisions on the use of State property.

26. Mr. ADENSAMER (Austria) said that the recommendation on constitutional issues should not use hortatory language that called for a review of the underlying principles of States' constitutions. His delegation was therefore in favour of retaining the more flexible and diplomatic wording "it is advisable".

27. Ms. GUREYEVA (Russian Federation), referring to the recommendation on constitutional issues, said that, in order to dispel the concerns that had been expressed by a number of States, the words "review existing constitutional provisions" should be amended to read "review existing legislation".

28. Ms. PIAGGI de VANOSSI (Argentina) said that her delegation supported the statement by the representative of the Russian Federation. The Commission should not spend an undue amount of time on redrafting the text of the recommendation.

29. Mr. GILL (India) said that, in most States, the federal units of the State had the authority to provide the land needed for a particular project. The financing of projects was governed by the relevant financial regulations. In such situations, amending of the constitution was unnecessary.

30. Mr. KOVAR (United States of America) said that the discussion on the legislative recommendation on constitutional issues had illustrated that focusing on constitutions was not the best approach. It was more advisable to focus on the need for Governments to provide the legal authority to enter into privately financed infrastructure projects. That would require a State to review the laws that applied to such projects. While such laws might include constitutional provisions, they would always include national legislation and

regulations and, in some cases, local legislation and regulations. It might also be necessary to review the overall authority to allow non-national entities to provide typically public infrastructure and service benefits. Problems might arise with respect to the ownership or lease of public land and other facilities. Perhaps a redrafting of the recommendation to include those concerns might help alleviate the concerns that had been expressed by some delegations.

31. Mr. MORENO RUFFINELLI (Paraguay) said that it was obvious that, if constitutional provisions restricted private investment, it was the sovereign right of every State to retain or remove those provisions. His delegation agreed with the representative of Argentina that the Commission was spending too much time on an issue that seemed self-evident.

32. Ms. ALLEN (United Kingdom) said that it was not the purpose of the guide to persuade States to enter into privately financed infrastructure projects; that was the prerogative of each State. The guide only pointed out that, once a country decided that it wished to promote private sector investment in its infrastructure, it was essential to consider all the obstacles to such investment; the constitution might be one of those obstacles.

The meeting was suspended at 11.30 a.m. and resumed at 12 p.m.

33. Ms. GUILEN (Observer for Venezuela) said that the question as to whether constitutional amendments might be needed was answered in paragraph 5 of the notes, which explained that in some countries it had been found appropriate to adopt specific legislation. New draft laws must be carefully scrutinized to ensure that they did not conflict with constitutional requirements.

34. Ms. GÜRAY (Observer for Turkey) commented that constitutional issues were highly sensitive. It was necessary to devise a clear legislative framework, and in that sense she agreed with the representative of the United Kingdom. Paragraph 4 of the notes was quite acceptable as it stood, since it reflected the core concerns of all parties.

35. Mr. LAMBERTZ (Observer for Sweden) said that, in view of the sensitive issues involved, he would prefer somewhat milder wording. It was important not to give the impression that States would be called upon to amend their constitutions. The approach suggested by the United States representative was a good one. Another possibility, in the light of the suggestion made by the representative of the Russian Federation, was simply to tone down the language by stating, for instance: "It is advisable for a country wishing to attract private investment in infrastructure to review existing legislative provisions". The emphasis should be on reviewing the law, not amending the constitution, with a view to identifying possible restrictions.

36. Mr. OLIVENCIA RUIZ (Spain) sought to clarify what his delegation had already said. Before any of the provisions in the draft guide could be adopted, it was absolutely necessary - not just advisable - that all existing legislation be reviewed, to ensure that no legal obstacle existed either in the constitution or in law. The Commission should not, however, be suggesting constitutional amendments, even as a possibility.

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37. The CHAIRMAN concluded that, in the Commission's view, it was important to deal very carefully with the sensitive issue of constitutional requirements, while recommending a review of legislation in general.

Recommendation 2 on general and sector specific legislation (paras. 5 to 8 of the notes)

38. Mr. KOVAR (United States of America) said that the Commission might wish to reorganize the recommendations to reduce their number. If what was intended was a list of principles for the guidance of legislators, as recommendation 2 implied, there would be a case for combining the first two recommendations, which were interrelated. Was the Commission aiming for general legislation, to be supplemented by sector-specific legislation such as already existed in some countries, in contrast with the case-by-case approach? If so, it must decide how many of the points covered in the thirteen recommendations were to be covered in the general legislation.

Recommendations 3 and 4 on legislative authority to grant concessions (paras. 10 and 11 of the notes)

39. Mr. AL-NASSER (Observer for Saudi Arabia), commenting on the title of recommendations 3 and 4, said that the term "legislative authority" was not appropriate for States such as his own, where a Government agency such as the Ministry of Finance or Industry was mandated to deal with infrastructure projects, and especially with aspects related to private sector participation and non-national investors.

Recommendation 5 on the legal regime of the project (paras. 12 to 15 of the notes)

40. Mr. NIKANJAM (Islamic Republic of Iran) said that she would prefer to substitute looser wording for "legal regime" in reference to infrastructure project legislation.

41. Mr. LAMBERTZ (Observer for Sweden) said that the title of chapter I, "General legislative considerations", seemed to indicate that the chapter would deal with general principles, such as the need for clarity and stability in the law governing investment, the pacta sunt servanda rule, and so on. However, that was far from being the case and he wondered where the line was to be drawn between general legislation and the specific recommendations contained in the chapter. With regard to recommendation 2, general enabling legislation was not the only way of granting authorization for privately financed infrastructure projects; there were other private law methods, such as those mentioned in recommendation 12.

42. Mr. BARBOSA FARIA (International Trade Law Branch), replying to the representative of Sweden, said that chapter I had been drafted in such a way as to avoid technicalities wherever possible. It had been thought preferable to address problems such as legal certainty in the specific context in which they arose, such as the conduct of the parties to an agreement. With regard to recommendation 12, the Commission had earlier asked for a reference to other relevant areas of legislation to be included, but the question of privately

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financed infrastructure projects did not call for a detailed examination of contract law.

43. Mr. WALLACE (United States of America) said that the term "legislative authority to grant concessions" could be said to cover recommendations 1, 2, 3 and 4, and possibly recommendations 5 and 6 as well. What was sought was a general law authorizing or enabling the State to enter into a particular kind of transaction if it so wished. The Commission should therefore decide what the general enabling legislation should include, without drafting any specific principles. In some cases, as the observer for Saudi Arabia had pointed out, a State agency might be given authority to act and would thus be empowered to enter into agreements and to fulfil undertakings. In any case, the enabling legislation should provide for authority to act in a number of areas: to provide the site and the necessary facilities; to exercise eminent domain; to convey or assign a lease to the project company, together with all necessary property interests; and to cover the necessary security interests, such as step-in rights to enable a secured lender to take action against a project company and its assets. As implied in recommendation 5, a Government should also have the freedom to negotiate commercial terms, to agree to commercial arbitration and to exercise choice of forum. The requisite authority would also enable a Government to grant protection to investors, for instance, through stabilization clauses and the availability of foreign exchange, tax provisions for both foreign and domestic investors and, perhaps, other provisions such as the indexation of local currency payments and even measures to deal with bribery and corruption. Other issues to be considered were the duration of the arrangements in question and whether they should be exclusive; the method of selecting the project company; and the ability to grant guarantees and other assurances. All those aspects should be covered in the enabling legislation.

44. Mr. OLIVENCIA RUIZ (Spain) said that recommendations 3 and 4 in fact related to domestic law and were therefore based on recommendation 2, which mentioned the drafting of special laws for specific infrastructure sectors. Recommendation 2 stated that general legislation might be "supplemented" by such special laws; that statement presupposed the existence of general enabling legislation, which might not in fact exist.

45. The words "debe definir" in the Spanish version of recommendation 3 were too categorical; other parts of the draft used the more appropriate "deberia", which was closer to the meaning of the English word "should".

46. Mr. LALLIOT (France) said there were various inconsistencies in word usage which created confusion. Paragraph 9 of the notes spoke of the "enactment of special legislation or regulations", whereas heading (a), which followed that paragraph, used the term "legislative authority". Under French law, there was a hierarchy among the various kinds of legislation; that was surely the case in other countries too. One approach would be to use a generic term which covered many possibilities; another would be to amend the second term in order to avoid ambiguity, for example, by using the words "legislative or regulatory authority".

47. To a French legal expert, the first sentence of paragraph 9 was absolutely meaningless: when an entity was decentralized, it did not belong to the State.

The problem might arise from the use of the word "State." If the relevant phrase were redrafted to read: "the enactment of special legislation or regulations authorizing a public entity or public legal person to entrust the provision of public services to a third party", that would avoid such issues as how the State was defined and organized and what the relationship was between central bodies and decentralized entities.

48. Paragraph 11 of the notes, which discussed the remuneration of a contractor, would more properly be included under heading (b): "Legal regime of privately financed infrastructure projects". Lastly, he did not understand the final sentence of paragraph 13: did it mean that the ability of a public contracting entity to revoke or alter terms could arise only from contractual provisions?

49. Mr. ESTRELLA FARIA (International Trade Law Branch) replied that, in some countries, concessions granted unilaterally could be revoked by the Government, whereas that might not necessarily be the case for concessions granted under bilateral agreements. In other countries, a concession granted unilaterally could not be revoked, except under special circumstances, because it became an acquired right.

50. Mr. RESTREPO-URIBE (Colombia) suggested that, to avoid misinterpretations, the final sentence of recommendation 5 should be revised to read: "The enactment of general enabling legislation may provide an opportunity for establishing mechanisms to facilitate project execution at both the general and the specific levels".

51. Mr. KOVAR (United States of America) said that, although his delegation had no specific comments to make on the recommendations currently under discussion, its earlier remarks were applicable to the entire draft guide. Further drafting remained to be done, whether by the Commission, the Secretariat or a working group.

52. Mr. OLIVENCIA RUIZ (Spain) agreed that the text needed improvement. His delegation would submit its comments on word usage directly to the Secretariat. He also agreed that it would be best to avoid the word "State". In Spain, the local, municipal, provincial, autonomous and central authorities were all subsumed under the term "State". Furthermore, the term "concessionaire" was preferable to "company", because companies took many different forms.

53. Mr. LALJOT (France) asked how recommendation 8 related to recommendation 3 and whether the two should be merged.

54. Mr. ESTRELLA FARIA (International Trade Law Branch) replied that recommendation 8 referred to the authorities that were competent to grant concessions, whereas recommendation 3 referred to the general authority of the State - which was not the same in all countries - to award concessions.

The meeting rose at 1 p.m.

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GENERAL

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Held at Headquarters, New York,
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Chairman: Mr. MAZILU (Romania)

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PRIVATELY FINANCED INFRASTRUCTURE PROJECTS (continued)

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98-80727 (E)

The meeting was called to order at 3.05 p.m.

PRIVATELY FINANCED INFRASTRUCTURE PROJECTS (continued) (A/CN.9/444/Add.2)

1. The CHAIRMAN invited the Commission to resume its consideration of draft chapter I of the legislative guide on privately financed infrastructure projects (A/CN.9/444/Add.2).

Paragraphs 16-21

2. Mr. GILL (India), referring to paragraph 20, stressed the importance of the powers of public agencies or State organs to control compliance with safety regulations and to impose sanctions in the event of non-compliance. The Bhopal gas disaster alone was sufficient proof of the truth of the statement that safety was vital.

Paragraphs 22-27

3. Mr. KASHIWAGI (Japan) said with reference to recommendation 8 that with a plethora of governmental agencies and authorities involved, obtaining concessions and the various forms of approval needed was a time-consuming and expensive process. Therefore, what must be emphasized in paragraphs 22 and 23 was the key to a successful concession-awarding procedure: simplicity.

4. MR. RESTREPO-URIBE (Colombia) said that the question of administrative coordination of projects was sensitive in that local, national and regional jurisdictions at various levels tended to have interests that conflicted. Therefore, rather than suggesting some kind of centralized agency, as in paragraph 22, for processing applications, reference should be made to the need to provide interested parties with clear and comprehensive information about the powers and attributes of the various authorities involved in the administrative coordination of procedures for issuing the necessary licences and authorizations for their projects.

5. Mr. RENGER (Germany) said that as administrative coordination was vital for the success of any project, the issue was the most important one in the context of the agenda item under discussion. Administrative coordination was needed throughout a project. However, the details depended on the kind of project, on the constitutional situation in the host country and on all the parties involved. He therefore supported the previous speaker's suggestion that provision of clear and comprehensive information was the key. Even so, the process of bringing a project to fruition would always be burdensome, the more so the more authorities were involved.

6. Ms. NIKANJAM (Islamic Republic of Iran) said with reference to paragraph 27, which contained the phrase "for constitutional or other reasons", that in her delegation's opinion constitutional reasons should not be set on the same plane as other, organizational reasons. If constitutional reasons were a barrier to a government's issuing a licence, it could not then provide any assurance that a licence would be granted, so there would be no point providing

assistance to the project company in obtaining one: the constitution would have to be changed first.

7. Mr. ESTRELLA FARIA (International Trade Law Branch), responding to the point raised by the representative of the Islamic Republic of Iran, said that the intent of paragraph 27 was to indicate that if a government was not in a constitutional position to centralize the issuance of licences or to entrust a single body with a coordinating function, it would be advisable for it to consider providing some assurance that it would nevertheless assist the project company in obtaining the necessary licences.

8. Mr. KOVAR (United States of America) said that the principles of simplicity, as mentioned by the representative of Japan; coordination between agencies down to the local level; consistency of actions between agencies; and the availability of information, as mentioned by the representative of Colombia, could all be termed aspects of transparency or openness and were all important.

9. Ms. GUREYEVA (Russian Federation) said the terms used in the paragraphs under discussion needed to be made more specific. Such expressions as "general enabling legislation" and "general legislation" in paragraph 23, followed by "the legislation" in paragraph 24, created more problems than solutions; in paragraph 26 the expression "early assessment" was also vague.

Paragraphs 28-39

10. Mr. RESTREPO-URIBE (Colombia) said that reference should be made in the paragraphs under discussion to norms developed in the context of international integration agreements; in some circumstances, the provisions, practices and policies found in or consequent on such subregional or regional integration agreements could be applicable nationally, as in Colombia, where foreign investment regulations, intellectual property rights and the like were governed by decisions of the Andean Board of the Cartagena Agreement.

11. In the context of company law, clarification should be given that in some cases concessionaires were subject not only to company law but, under the conditions of their concession, must meet other financial or technical conditions and requirements, as was the case in Colombia for companies operating seaports or providing services to domestic residences.

12. Turning to paragraph 36, on rules and procedures on expropriation, he noted the statement that the host Government usually assumed responsibility for providing the land required for the implementation of a project; however, there were exceptions to that general rule and it happened all too often that concessionaires found themselves bearing additional costs as a result of insufficient information about the risks in terms of time and resources, and about the legal redress they might seek, when forced to assume unwarranted liabilities. Therefore, he saw a need for the paragraph to be redrafted to cover the circumstance where it was not the host Government but the concessionaire who was responsible for acquiring the land for a project.

13. He saw a need also for a new paragraph about the foreign exchange regime that would apply to a given project. Although the issue was covered to some

extent in paragraphs 29 to 32 under the heading "Investment protection" and in paragraphs 55 to 57 under the heading "Tax law", a more specific reference was needed because of the great importance of the issue for some projects.

14. Specifically in respect of tax law, he noted that some countries had adopted the practice of entering into agreements with foreign investors which guaranteed stability and clarity in the taxation regime that would apply to their project. That approach could be the right one for some countries and should be mentioned in the text.

15. The tax law information provided to concessionaires was also often inadequate, even though such information might be of assistance to concessionaires and might even prove to be an incentive. The need for tax information to be provided should therefore also be mentioned in the text.

16. Particular emphasis should be given to an issue currently absent from the text: legal instruments relating to transparency and combating corruption. In that context, the Commission might look at the relevant texts from the Organisation for Economic Cooperation and Development (OECD), the International Chamber of Commerce and non-governmental organizations working in that area.

17. Mr. ESTRELLA FARIA (International Trade Law Branch) said that the secretariat would see how the points raised by the representative of Colombia, particularly those on taxation and exchange stabilization, might be incorporated into the text.

18. He pointed out that the question of expropriation was to be dealt with in greater detail in a later chapter of the guide, and the purpose of paragraphs 36 and 37 was merely to flag the importance of legislation for simple and easy expropriation procedures in the context of privately financed infrastructure projects.

19. Mr. ALABRUNE (France) referred to the third sentence of paragraph 37, concerning delays in expropriation where court proceedings were involved. The wording as it stood was unfortunate as it included no mention of compensation for expropriation, which in France was determined, after the administrative phase of the expropriation procedure had been carried out, in special court proceedings and subject to constitutional constraints whereby the judge was the guarantor of respect for private property rights.

20. Corruption was an important issue that must be covered in the guide at some point. In that connection, he supported the representative of Colombia, with the exception that before recommendations by non-governmental organizations were examined, the Commission should look at current national legislation and the various anti-corruption agencies. He suggested that in addition to the OECD text, the Commission might look at the instrument on corruption being drafted in the Council of Europe.

21. Mr. GILL (India) said, with reference to paragraphs 29 to 31, on investment protection, that in most European countries, and also in India, investment protection was effected on a bilateral basis whether government to government or between private finance corporations. In practice, in negotiations on such

arrangements all the subsidiary laws and regulations covered in the section of the document currently under discussion were taken into account.

22. Therefore, he wondered why amendments to laws were being proposed in the document whereas the necessary arrangements were universally agreed within existing local frameworks on both sides. Also, it would in any case be foolish not to ensure that one's investments were adequately protected. To propose changes in legislation would be to delve too deeply into detail in the case in point; moreover, it would be redundant because almost every country was well aware of current practice in the areas covered.

23. Ms. GIOIA (Italy), referring to paragraphs 38 and 39, said that, in respect of protection of intellectual property rights and enforcement of those rights, national and foreign private investors needed different treatment because national investors should already be adequately protected by national laws. For foreign investors, it must be remembered that patent protection applied in the first place in the country granting that protection. Even in the European Union, where patent law harmonization was relatively advanced, no patent was valid everywhere in the Union. The difference between national and foreign investors in respect of patent law should therefore be made explicit in the subsection on intellectual property law.

24. A solution might be found in the suggestion in paragraph 39 that the Commission might consult with the World Intellectual Property Organization in order to find an international solution to the problem.

25. Ms. MUSOLINO (Australia) said that the description of the OECD multilateral agreement on investment in paragraph 32 should be redrafted in such a way as not to focus directly on dispute settlement. While the OECD agreement did indeed deal with dispute settlement, that was not its main focus; therefore, she proposed that the reference to dispute settlement should be moved to the end of the paragraph and reworded to read "and to provide dispute settlement options".

26. In paragraph 39, it would be helpful to amend the phrase "international agreements regarding the protection and registration of property rights" to read "international agreements regarding the recognition, protection and registration of property rights".

27. Mr. SHANKS (United States of America) said that the title of section B.1 "Investment protection", should be amended so as to read "Investment protection and promotion", to reflect the actual scope of subsection 1.

28. The reference at the end of paragraph 29 to companies' access to foreign exchange and their ability to transfer abroad or repatriate their profits should include mention of companies' need to remit foreign exchange abroad in order to repay project-related loans.

29. For the same paragraph, the Commission might wish to refer to the possibility of indexation of local currency payments, which frequently became an issue as private investors faced the danger of possible devaluation of local currencies.

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30. The title of section B.2, "Property law", should also be broadened to "Property law and security interests" or some other such term, again in order to reflect the actual scope of the paragraphs concerned.

31. He expressed his delegation's support for the representatives of France and Colombia in respect of adding a reference to the OECD Convention of 17 December 1997 on Combating Bribery of Foreign Public Officials in International Business Transactions.

32. Turning to paragraph 34, he said that the concept of "reasonable proof" that ownership of land would not be subject to dispute needed to be strengthened: the words "clear evidence" might be appropriate.

33. In section B.3, "Rules and procedures on expropriation", his delegation believed that "expropriation" was not the best term and would prefer reference to the concepts of eminent domain, condemnation or some other suitable term. Also, his delegation doubted the need to discuss expropriation in the document; however, if the secretariat insisted on so doing, then there would be a need to refer to an appropriate international standard of prompt, adequate and effective compensation for expropriated property.

34. In response to the points raised by the representative of Italy relative to section B.4, "Intellectual property law", he said that his country's position was that Governments, if they were interested in attracting foreign private investment for infrastructure projects, should consider strengthening their domestic intellectual property protection legislation if such strengthening was needed.

35. Mr. MORENO RUFFINELLI (Paraguay) supported a rapid expropriation process that would favour private investment. Noting that, in his country, expropriation was subject to national legislation and pre-payment, he proposed adding the following clause to the final sentence of paragraph 37: "provided that this is in accordance with the legislation of the country in question".

36. Mr. CHOUKRI (Observer for Morocco), referring to the second sentence of paragraph 29, said that the draft should emphasize the legal recourse of investors, including with regard to the amount of compensation, in instances where the laws on nationalization and dispossession were violated. In developing countries, in particular, that would increase stability and control the problem of emigration. Local labour should be used as a matter of priority. The right of investors to recover their investments should not be dealt with in the paragraphs in question.

37. Ms. ARBELAEZ (Colombia), under section B on other relevant areas of legislation, stressed the need to tighten State supervision and control over public service providers, particularly with regard to privately financed infrastructure projects. In that connection, she said that consumer protection laws should be strengthened in order to protect citizens against monopolies.

38. Mr. LEON (Colombia) suggested, under the same section, mentioning the legislation adopted by some countries, such as Colombia, for the protection of their indigenous populations. In recent years, Colombia had been adopting

environmental and other legislation for the protection of such populations and their cultures against harmful aspects of development. His delegation would submit a summary of its views in that regard.

39. Mr. AL-NASSER (Observer for Saudi Arabia) said that paragraph 31 should also discuss the reinvestment of profits in the host country, since the repatriation of proceeds of investment in a country of origin could have an adverse impact on its economy. The first sentence of paragraph 36 implied too great a responsibility for the State with regard to the insurance costs of implementing the project. Noting that, in Saudi Arabia, investors were entitled to lend or sell property to foreigners, he said that the investor should be made to assume a portion of such costs.

40. Mr. AL-ZAID (Observer for Kuwait) said that the second sentence of paragraph 29 should also stress the importance of using local currency and local labour and of making purchases in local markets. Furthermore, a reference to tax exemption would reassure investors.

Paragraphs 40 to 49

41. Mr. TELL (France) said that the fundamental question of loan guarantees should be developed in greater detail, preferably in a separate chapter. Referring to the second sentence of paragraph 40, he specified that traditionally a mortgage was a guarantee on real property; it applied to personal (movable property), such as ships or aircraft, only in exceptional cases. A mortgage was generally a long-term guarantee whose source of reimbursement was the evolution and end-product of the project itself. It was rarely equal to the amount of the debt and would not be worth very much if the project failed. In that context, the secretariat should specify the meaning of physical assets of the project company and those physical assets to which mortgages would apply. It should also clarify the hierarchy of the various types of guarantees. He believed that the property on which public service facilities were located could not be mortgaged, as it belonged to the licensor.

42. Ms. FOLLIOT (France) said that, under French law, licences for public works projects, i.e., projects executed in the public domain, were inalienable, meaning that they could not be sold, expropriated, or subject to other procedures under civil law. Therefore, the paragraph should specify the type of property in question - e.g., assets or real property - and indicate that mortgages were permissible only under certain types of contracts where the property was not in the public domain.

43. Mr. ESTRELLA FARIA (International Trade Law Branch) said that the draft was intended to draw attention to the distant relationship between security on concessions and the general regime in a given country. Within that context, it discussed mortgages and charges in general terms. He proposed deferring the discussion of securities in draft agreements, which was covered in chapter IV (A/CN.9/444/Add.5). The problem of terminology in chapter I, pointed out by the French delegation would be addressed.

44. Mr. ADENSAMER (Austria) suggested deleting the fourth sentence of paragraph 40, whose meaning and purpose were unclear. He wondered what conclusion was to

be drawn from that sentence, since there was no possibility of harmonizing the various legal systems of host countries. The final sentence, on the importance of ensuring legal protection of secured creditors, was sufficient in itself

45. Perhaps the first sentence of paragraph 41 should refer to "registers" rather than the "central register". It was not apparent that all countries had a central register.

46. Mr. WALLACE (United States of America) noted that the reference to a favourable legal framework in paragraph 28 implied, particularly within the context of reform, the need to amend legislation in order to promote private investment in infrastructure. The second sentence of paragraph 40 should be developed further; in that context, the hierarchy of the types of security might be rearranged. For instance, the pledge of shares was a widely used form of security, and security interests could extend to tangible assets other than accounts receivable, such as insurance proceeds or even recovery in civil litigation.

47. Security law was primarily intended to benefit lenders, who frequently demanded the right to represent the borrower, i.e., the project company. Although the question of assignment was dealt with in chapter IV, it might be useful to mention it in chapter I as well. With regard to paragraph 45, he said that the work of UNIDROIT on security interests in mobile equipment might be of relevance to the Commission's discussion of privately financed infrastructure projects. Noting the reference to bonds, debentures and other securities under company law (para. 47), he said that the development of certain forms of private financing might result in the creation of new capital markets that would need to be regulated. Reference should be made to that possibility. Lastly, with regard to the final sentence of paragraph 49, he noted that in some, though not all, systems of company law, company directors - and not only shareholders - could enter into management contracts. That should be indicated in the draft.

48. Mr. GILL (India) requested clarification as to whether the issue was one of financial or legal security. It would be particularly important to make that distinction in cases where third-party receivables were transferred to private individuals rather than Governments.

49. Mr. OLIVENCIA RUIZ (Spain), referring to paragraph 40, noted that the study of real rights to security in varying systems of public law was extremely problematical. He agreed with the representative of Austria that not all countries had central registers (para. 41); for example, his own country did not. Since it was impossible to specify all types of guarantees, it should be sufficient to ascertain the existence of arrangements for the adequate protection of third-party creditors in various countries.

50. Under the heading of company law, he noted that project companies were usually but not necessarily consortia; they could also be a single entity, whether national or foreign, previously established in the host country, or an entity established outside the host country whose legal personality was recognized by the host country. Specifying a particular legal structure would only increase the risk of error. The first sentence of paragraph 46 should therefore read: "in most cases, there will be a consortium and its members will

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create a new entity". Similarly, the repeated use of the term "shareholder" gave rise to confusion, since it could refer to shareholders in, inter alia, joint stock companies, limited partnerships and limited liability companies. In his country, a distinction was also made between permanent companies and temporary unions of companies set up for a specific purpose, such as construction. Since a concessionaire entity often gave rise to an independent legal entity in the host country, a catalogue of different types of companies and the extent of the members' liability in each case would be useful. He stressed the need for specific regulations concerning corporate governance (through boards of directors or other administrative bodies), the protection of minority shareholders with respect to majority shareholders and cases of conflict of interest. The legal structure, e.g., the type of company, was less important than whether or not such requirements were fulfilled, particularly within the context of privately financed infrastructure projects.

51. Mr. MARADIAGA (Honduras) wondered whether the concerns expressed by the representatives of Austria and Spain with regard to a central register (para. 41) were mitigated by the phrase "or other public register". Referring to paragraph 46 under company law, he said that he agreed with the representative of Spain that consortia were not the only companies involved and that the language of the draft should be broader. In order to guard against corruption, the paragraph should also specify the liability, including the potential criminal liability, of the consortium's or company's management. Paragraph 49 should guarantee the rights of third-party contractors as well as the rights of minority shareholders.

The meeting was suspended at 4.35 p.m. and resumed at 5.05 p.m.

52. Ms. GIOIA (Italy) said that she wondered why paragraphs 46 to 49 alluded to only one form of legal entity that could undertake projects in a host country, whereas that was not the only possible model. Similarly, no emphasis had previously been placed on the fact that legal entities should be established as such in their respective host countries.

53. Mr. ESTRELLA FARIA (International Trade Law Branch) assured the representative of Italy that the text would be amended to reflect the fact that not all project companies were corporations. He also pointed out that paragraphs 22 and onwards of document A/CN.9/444/Add.5, dealt with the issues which determined whether or not concessionaires were established as legal entities in a host country.

54. Mr. CHOUKRI (Observer for Morocco) said that since there could be several registers that related to commercial entities within a country or city, in the first sentence of paragraph 41, "central register of title or other public register" should be amended to read, "central register of title or another local or public register".

55. The second sentence of paragraph 46 should begin with the following wording: "It is therefore important for the host Government to have adequate company laws including modern provisions on essential matters such as the establishment of companies, agencies and branches ...".

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56. He agreed entirely with the representative of Honduras, and suggested that the first sentence of paragraph 48 should be amended to read, "Modern company laws often contain specific provisions regulating the conduct of managers and civil and criminal liability for companies and for others to exclude any conflicts of interest."

57. Mr. LAMBERTZ (Observer for Sweden) said that the wording of legislative recommendation 12 implied that security law was not of direct relevance to privately financed infrastructure projects. He believed that legislation which provided effective security for credits and other financing was of paramount importance.

58. He suggested that legislative recommendation 12 should be expanded to include other aspects of section B of document A/CN.9/444/Add.2, such as investment protection and company law.

59. He shared the views expressed by the representatives of Austria and Spain, and the Observer for Morocco, on paragraphs 40 and 41. The penultimate sentence of paragraph 40 should be deleted or amended, and paragraph 41 should be amended to include the possibility of local registers.

60. Mr. TELL (France) said that his delegation was not pleased with the general treatment of document A/CN.9/444/Add.2. The subsection on security law should be amended to clearly address the need for host countries to enact legislative provisions on securities. It would also be advisable to draw a distinction between various types of securities.

61. Pending further discussion on the issue of securities in the consideration of document A/CN.9/444/Add.5, he suggested that in the French text the expression "droit de propriété" should be replaced by "droit réel" in the second sentence of paragraph 41.

62. Mr. WALLACE (United States of America) stressed the importance of security law to privately financed infrastructure projects. Taking up the point made earlier by the representative of India, he wondered whether the Secretariat could find a more suitable name for subsection 5, "Security law", which would give a clearer idea of the scope of the subject.

Paragraphs 50 to 54

63. Mr. WALLACE (United States of America) said that since paragraph 50 concerned accounting practices, yet was included under section B, entitled "Other relevant areas of legislation", it would be appropriate to add an introductory sentence indicating how the law applied to accounting.

64. Referring to the first sentence of paragraph 51, he stressed the difficulties encountered in seeking contractual solutions to problems arising in a number of countries, particularly in those under the administrative law regime. There was likewise an urgent need for a system of enforcement, either through the judiciary, arbitration or other methods of resolution.

65. Mr. TELL (France) said that his delegation was concerned by the fact that mention had repeatedly been made of countries governed by administrative law, and of countries which had legislative restrictions on the arbitration of disputes between public legal persons and individuals.

66. In his opinion, paragraph 51 related to commercial contract law and it was certainly a question of the contractual environment in which project companies worked to set up projects with entities in host countries. France fully understood the need for domestic legislation to include provisions facilitating the conclusion of contracts in private law, enabling the parties to execute those contracts in the event of default. If there were difficulties arising outside the scope of paragraph 51, those problems could be discussed at the appropriate time. However, his delegation was interested in having examples of the problematic situations to which earlier reference had been made.

67. Mr. WALLACE (United States of America) said that the contractual arrangements for infrastructure projects could be considered as a matrix of contracts, which might include such models as build-operate-transfer (BOT) and build-operate-own-transfer (BOOT). At the core of each model, however, was an agreement between the host Government and the project company. The courts in a number of civil law States had ruled that any such agreement must be subject to domestic administrative law, and one of the practical consequences of that ruling was that Governments were unwilling to agree to submit disputes to arbitration, since the law itself provided specific remedies, penalties and rights. It would be pure coincidence if both parties were to agree in negotiations to be bound by the provisions of the applicable administrative law. That was the issue addressed in paragraph 51, which stated that the domestic law on commercial contracts should provide adequate solutions to the needs of the project company and the lenders, including flexibility in devising contracts as needed for the construction and operation of the infrastructure facility.

68. Mr. RESTREPO-URIBE (Colombia) agreed with the representative of the United States on the need for flexibility in the contractual relationship between the host Government and the concessionaire. It might therefore be useful to include a reference to the UNIDROIT principles governing international contracts, which generally reflected the practices and policies followed by States in the field of contract law.

69. Mr. GILL (India) said that, on the question of how the claims of secured creditors were ranked, India was of the view that the host Government should be given priority in any insolvency proceedings involving the competing claims of secured creditors.

70. Mr. CHOUKRI (Observer for Morocco) said that it might be useful to insert after the words "to take the measures required" in the first sentence of paragraph 53 the words "to assist companies in difficulty and to permit out of court settlement so as".

71. Mr. HERMANN (Secretary of the Commission), referring to an earlier suggestion by the representative of Colombia, said that the Secretariat had not included a reference to the UNIDROIT principles because its intention had been

merely to review the legislative framework and not to place limitations on the freedom of the parties to reach their own agreements.

72. Mr. OLIVENCIA RUIZ (Spain) said that the insolvency of an infrastructure operator or public service provider created three problems: ensuring the continuity of the project; ranking the claims of secured creditors; and the adoption of legislation to govern cross-border insolvency proceedings. It might be useful to address each of those issues in a separate paragraph of the draft guide.

73. On the subject of ensuring the continuity of the project, he believed that the public interest in continuity was more important than the interest of the private investor; the regime governing the project company should therefore include special provisions for such continuity.

74. With regard to the ranking of the claims of secured creditors, the guide should clearly establish whether secured creditors should be given priority over other creditors. As the representative of France had pointed out, domestic legislation in some States provided that, even in the case of mortgage-backed securities, other creditors could be given priority.

75. He agreed that the UNCITRAL Model Law on Cross-Border Insolvency should govern foreign insolvency proceedings, which were becoming more and more frequent in an increasingly global economy.

76. Ms. NIKANJAM (Islamic Republic of Iran) asked whether the guide was recommending that standard accounting practices should be incorporated into domestic legislation and whether it might not be useful to include examples of such standards in the guide. She also wondered whether the provisions of the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) specifically governed the importation of large quantities of supplies and equipment. Lastly, she wished to draw attention to the difficulty inherent in securing the cooperation of foreign judicial authorities in cases of cross-border insolvency, since many States had not addressed the issue in their domestic legislation.

77. Mr. ESTRELLA FARIA (International Trade Law Branch), responding to the first question posed by the representative of the Islamic Republic of Iran, said that the purpose of the paragraph was simply to draw attention to other relevant fields of law and not to provide extensive guidance on accounting practices. If, however, the Commission considered it useful, then the Secretariat could include in the paragraph a reference to international accounting standards.

78. Mr. TELL (France) asked whether the contracts mentioned in paragraph 51 referred to agreements between public entities and concessionaires or to agreements between concessionaires and their suppliers.

79. Mr. ESTRELLA FARIA (International Trade Law Branch) said that contracts referred to the agreements between concessionaires and their suppliers of materials and services.

80. Mr. RENGER (Germany), referring to the suggestion made by the representative of Spain that paragraph 53 should be redrafted as several separate paragraphs, said that if that proposal was accepted he would suggest the inclusion of a further clarification, namely, whether lenders were entitled to keep the payments received during the critical period prior to the opening of insolvency proceedings.

The meeting rose at 6 p.m.

UNITED
NATIONS

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General Assembly

Distr.
GENERAL

A/CN.9/SR.636
13 May 1999

ORIGINAL: ENGLISH

UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Thirty-first session

SUMMARY RECORD OF THE 636th MEETING

Held at Headquarters, New York,
on Wednesday, 3 June 1998, at 10 a.m.

Chairman: Mr. MAZILU (Romania)

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PRIVATELY FINANCED INFRASTRUCTURE PROJECTS (continued)

ELECTION OF OFFICERS (continued)

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Any corrections to the records of the meetings of this session will be consolidated in a single corrigendum, to be issued shortly after the end of the session.

98-80733 (E)

The meeting was called to order at 10.05 a.m.

PRIVATELY FINANCED INFRASTRUCTURE PROJECTS (continued) (A/CN.9/444/Add.2 and 3)

1. The CHAIRMAN invited the Commission to continue its consideration of the legislative recommendations and explanatory notes in document A/CN.9/444/Add.2.

Recommendation 12 (continued)

Paragraphs 28 to 54 (continued)

2. Mr. WALLACE (United States of America), referring to recommendation 12 on other relevant areas of legislation and, more specifically, contract law (paras. 51 and 52 of the explanatory notes), said that a question had been raised about the relationship between paragraph 51 and paragraphs 12 and 15, which described the legal regime of privately financed infrastructure projects but did not specify the contracts to which it applied. The general description of the importance of commercial contract law and enforceability in paragraph 51 likewise did not make it absolutely clear to which contracts such law would apply. Some countries were stricter than others in that regard. Many sponsors wished to apply regimes of commercial private law rather than public administrative law to their contracts. The issue should therefore be clarified.

3. Mr. MARADIAGA (Honduras), referring to paragraph 50, on accounting practices, said that standardization was being achieved in the area of models for generally acceptable accounting practices. The wording of the last sentence of the paragraph should therefore be strengthened to emphasize that such practices were essential. In the same spirit, the language of paragraph 54 might also be strengthened to reflect the fact that it was not just desirable, but essential, for the host country to have provisions in place that facilitated court access.

4. Mr. GUISLAIN (Observer for the World Bank), returning to recommendation 3 and paragraph 10 of the notes, suggested that the option of a "positive list" and a "negative list" of areas of activity where concessions could and could not be awarded should be offered. The text should also say more about constitutional issues; in some cases, constitutions might have to be changed to accommodate infrastructure projects as Governments shifted previously State-run activities to the private sector.

5. It would be worthwhile to explore how certain legal regimes had addressed the issues of security and collateral for infrastructure assets.

6. Mr. LALLIOT (France) said that the existence of administrative law was not in itself an obstacle to privately financed infrastructure projects. The rules of administrative law were set out clearly and known to all parties in advance. It was for the judge to interpret the law, within very strict limits. Making a distinction between civil and administrative law or public law and common law seemed to him to miss the point; the true distinction lay between countries with a clear and highly developed body of law and those whose legal system was less sophisticated.

7. It was important to keep in mind that the goal of the current exercise was not to impose one model, but to present a variety of models and to explain their advantages and disadvantages so that Governments could make an informed choice.

8. Mr. HERRMANN (Secretary of the Commission) pointed out that administrative law did not apply to the contract, but to the nature of the public entity entering into the contract. Under international law, public entities in international trade had the right to conclude arbitration agreements. Rather than thinking in terms of general categories, which was potentially misleading, it would be more helpful to look at individual issues, for example, settlement of disputes.

Paragraphs 55 to 62

9. Mr. KASHIWAGI (Japan), referring to the question of tax law (paras. 55 to 57), said that for foreign investors, predictability, stability and continuity in the tax regime and the investment environment of the host country were very important, because those factors affected project feasibility and the recovery of investment.

10. Mr. WALLACE (United States of America), referring to paragraphs 61 and 62 on settlement of disputes, said that the different levels of disputes which could arise at the different stages of a project should be reflected in the text, along with possible remedies. A reference to choice of law and governing law should also be included.

11. The International Centre for the Settlement of Investment Disputes (ICSID) had been mentioned as one forum for dispute settlement, but many other arbitration bodies were available and should be included, as ICSID was unlikely to have jurisdiction over all aspects of such disputes.

12. Mr. GUISLAIN (Observer for the World Bank) drew attention to the importance of environmental issues, which were among the major causes of disputes, and suggested that environmental law should be treated more fully in the text. More examples could be provided in paragraph 58, to give a better idea of where such problems arose.

13. With regard to disputes, many of the cases referred to ICSID did not derive from the arbitration clauses in contracts themselves, but from bilateral investment treaties which authorized arbitration. ICSID had in fact dealt with disputes involving privately funded infrastructure projects, and a discussion of such cases could be included in chapter II.

14. In connection with the environment, population resettlement as a result of infrastructure projects raised complex legal issues; a paragraph on that topic should perhaps be included to highlight its importance.

15. Mr. ESTRELLA FARIA (International Trade Law Branch) said that the purpose of paragraphs 58 to 60 was to stress the importance of a clear and stable environmental regime. Specific problems arising from project execution would be dealt with later in the text.

16. Mr. LALLIOT (France) noted that the tax law terminology used in paragraph 56 posed problems for his Government, which had a system of shared exemptions between the central and local levels.

17. Mr. TELL (France) said that only the legislative aspects of the environment had been taken into account; the preventive aspect must also be addressed. Some kind of clause on the settlement of environmental disputes was essential. The many alternative methods of dispute settlement, such as mediation, should also be included.

18. Mr. Sung-Kyu LEE (Observer for the Republic of Korea) said that his delegation was fully satisfied with paragraph 59. It felt, however, that the appeals procedures and judicial remedies cited in that paragraph should not be limited to environmental protection; such remedies should also be extended to matters of tax law, company law and property law. Disputes requiring legal remedies also arose in the areas of taxation and administrative regulation and control, which affected the normal operations of a business. In his delegation's view, a separate section should be drafted which would discuss the general protection of procedural rights in the civil, criminal and administrative areas.

19. Mr. RENGER (Germany) noted that paragraph 61 referred to the settlement of disputes through arbitration and, in particular, the recognition and enforcement of foreign arbitral awards. For international lenders, however, the recognition and enforcement of foreign court judgements was of equal importance; determining whether a payment was or was not due did not necessarily call for the expertise of arbitrators. Reference should therefore also be made to court litigation.

20. Ms. NIKANJAM (Islamic Republic of Iran) said that her delegation was satisfied with the answer given by the representative of the Office of Legal Affairs to the point raised by the Observer for the World Bank concerning environmental protection, which was indeed a matter of crucial importance. The section on environmental protection should perhaps also refer to the United Nations Environment Programme (UNEP) and the various international conventions and agreements on environmental protection, and call on States to establish sanctions for environmental damage.

21. Mr. CHOUKRI (Observer for Morocco) said that many developing countries offered tax incentives as a means of attracting foreign investors. Paragraph 56 should also mention the various kinds of tax incentives that existed, some of which operated over limited periods of time and some of which were indefinite. Foreign investors were often interested less in tax law than in administrative procedures, since they naturally preferred to operate in favourable, transparent climates where real competition could thrive.

22. Paragraph 56 discussed mechanisms designed to compensate private investors for the taxes imposed on them. It should also mention the need for investors to establish mechanisms for protection of the environment. Private companies often had more sophisticated technology than did Governments, and they should be required to rectify the damage they caused to the environment.

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27. Paragraph 61 should not only mention arbitration, which was in fact the most costly method of dispute settlement, but also call on States to reform their judicial systems and improve the operations of commercial courts. The legislative guide should include various means of dispute settlement.

24. Ms. ALLEN (United Kingdom) said that, while the Commission was understandably eager to showcase the UNCITRAL Model Law on International Commercial Arbitration, other dispute settlement mechanisms, including litigation, were also important. By way of a solution, the words "for example" might be inserted before the reference to the Model Law.

25. Mr. TELL (France) noted that the final sentence of paragraph 59 discussed the institution of legal proceedings to prevent environmental damage, while the first sentence of the French version of paragraph 60, in referring back to paragraph 59, spoke of "problèmes". The aforesaid legal proceedings could of course create problems for the establishment of privately financed infrastructure projects. However, more neutral wording should be adopted, and mention should be made of the existence of environmental protection organizations and of the public's right to seek legal remedies for environmental damage. It might also be useful to refer to the Convention on Access to Environment Information and Public Participation in Environmental Decision-Making, which had recently been opened for signature.

26. Mr. ESTRELLA FARIA (International Trade Law Branch) said that the word "problèmes" had emerged in translation; the word used in the original English text was "issues".

27. Mr. MORENO RUFFINELLI (Paraguay) agreed that protection of the environment was of the utmost importance. Paraguay's Constitution gave all citizens the right to institute legal proceedings in defence of the environment. The legislative guide afforded an opportunity to alert potential private investors to the existence of such rights and protections.

28. Ms. PIAGGI de VANOSSI (Argentina) suggested that a reference to the 1980 UNCITRAL Conciliation Rules should be included in paragraph 61. Furthermore, although difficult to put into practice, the suggestion might be included that investor countries should, in such matters, rely on the legal systems of host countries or, conversely, that host countries should rely on the legal systems of investor countries.

29. Mr. HERRMANN (Secretary of the Commission) reminded members that the object was to draft a legislative guide on privately financed infrastructure projects, not to resolve the issue of dispute settlement. Whether or not a model law on conciliation should be developed was to be discussed the following week at the New York Convention Day; the Commission had in fact been the first to develop a set of rules on conciliation. He was aware that mentioning only the UNCITRAL Model Law on International Commercial Arbitration might give rise to the misconception that the Commission preferred arbitration to other methods. He would be pleased to hear proposals as to other texts that might be mentioned, as long as those texts involved laws or conventions; a legislative guide could not take up other, less formal, methods.

30. Mr. AL-ZAID (Observer for Kuwait) said that his country had suffered terrible damage to its land and air and therefore attached great importance to the matter under consideration. His delegation believed that the section on environmental protection should be enhanced and expanded.

31. Mr. LAMBERTZ (Observer for Sweden) said that the Secretary's remarks did not resolve the issues raised with regard to paragraph 61. He agreed that paragraph 61 should reflect a wider range of possibilities and should, in particular, mention litigation as a means of dispute settlement. He shared the view of the Republic of Korea that the legislative guide should more broadly address the matter of procedural protections.

32. Ms. GUREYEVA (Russian Federation) agreed that the Secretary's remarks did not adequately address the concerns raised by members. The Commission should avoid issuing instructions that suggested that there was a single correct approach to dispute settlement; the legislative guide was meant to be flexible. Paragraph 61 should therefore be reformulated to include other forms of dispute settlement.

Recommendation 13 (paras. 63 to 67 of the notes)

33. Mr. WALLACE (United States of America) suggested that recommendation 13 should also indicate that Governments should be aware of existing international agreements to which they were already parties.

34. The second sentence of paragraph 64 should be redrafted as follows: "The most notable of those agreements have been negotiated under the auspices of the World Trade Organization (WTO) (formerly the General Agreement on Tariffs and Trade (GATT))" since GATT was still an existing agreement within WTO.

35. Reference might also be made to the Agreement on Government Procurement; although it currently had only 25 parties, there were plans to make it a general agreement to which all WTO members would be parties.

36. Mr. Sung-Kyu LEE (Observer for the Republic of Korea) said that the words "National legislation" should be dropped from the title of section C, since that section in fact dealt only with international agreements.

37. The CHAIRMAN announced that the Commission had concluded its consideration of draft chapter I of the legislative guide (A/CN.9/444/Add.2).

The meeting was suspended at 11.20 a.m. and resumed at 11.50 a.m.

38. The CHAIRMAN invited the Commission to consider draft chapter II of the legislative guide (A/CN.9/444/Add.3).

39. Mr. WALLACE (United States of America), supported by Mr. KASHIWAGI (Japan), pointed out that much of the material in draft chapter II dealt with policy, and at considerable length; there were no fewer than 25 legislative recommendations on sector structure and regulation. Since the purpose was to provide guidance, it might be desirable to shorten the recommendations, along the lines of the statement on exclusivity contained in paragraph 18 of document A/CN.9/444/Add.5.

The notes, on the other hand, could perhaps be expanded to include a definition of terms such as vertical and horizontal integration and monopoly rents. A detailed discussion of such issues could appropriately be placed in a separate annex. Regulation, which was an essential aspect of privatization, was closely linked to the operational phase of a project and should be discussed in that context.

40. Mr. LALLIOT (France) said that the notes were highly instructive and had reminded him of the changes which had taken place in recent years in a number of European countries in the sectors of telecommunications, gas and electricity supply, and railways. They argued for an end to monopolies and for the general introduction of competition in all sectors. That approach was justified in some cases, but in others was rather naive. He had the impression that, in some respects, economists had not advanced beyond the ideas in The Wealth of Nations and were overly concerned with market principles and market organization. For example, paragraph 2 of the notes contained the sentence: "Competition has been found to reduce costs and increase the productivity of infrastructure investment, as well as to enhance responsiveness to the needs of the customers". That was a peremptory statement which ought to be toned down; in some sectors, especially public services, competition was not the best way of operating and did not serve the public interest. The notes should be updated in that light.

41. Secondly, bearing in mind that the Commission was preparing a legislative guide, the present document seemed to place undue emphasis on the economic aspects of private financing, as opposed to the legal aspects dwelt upon in previous and subsequent documents. There was much discussion of the organization of the market and the role of competition in public sector projects. In that respect, he agreed with the United States representative that the recommendations should be briefer. As for the notes, they ignored the distinction drawn in French law, and in the law of other European Union countries, between sectors subject to regulation, for which permits and licences were granted, and those where relations were governed by contracts and thus largely by administrative law. The distinction was an important one for the purposes of future users of the guide.

42. Ms. PIAGGI de VANOSSI (Argentina) said that the document's emphasis on competition reflected the experience of many countries in recent years. Her country had opted for privatization to the greatest possible extent, while seeking to maintain the advantages previously offered by monopolies. In her view, there were no "natural" monopolies; any party which gained control of a service by means of privatization would inevitably strive to reduce competition.

43. Mr. HERRMANN (Secretary of the Commission) explained that the substance of draft chapter II had been contributed by the Private Sector Development Department of the World Bank, which would have to be consulted if some of the chapter's contents were to be substantially altered and placed in a separate annex.

44. Mr. OLIVENCIA RUIZ (Spain) welcomed the opening statement in recommendation 1, calling for a review of the assumptions under which State monopolies had originally been established. The phenomenon of "deregulation" sometimes meant abandoning binding rules of jus cogens. For that very reason,

it was necessary to review the practices of public monopolies before deciding whether to retain them or to open them up to free competition.

45. Mr. PEREZ (Colombia), commenting on paragraph 15, said that it was important to include a reference to the legal norms governing market protection. In his country, the courts were competent to decide whether a commercial operator had engaged in unfair competition or restrictive practices. Competition law was itself a form of regulation.

46. Mr. WALLACE (United States of America) pointed out that paragraph 28, concerning transport, made no mention of highways, bridges and tunnels, although the Channel Tunnel had been the biggest privately financed project of recent years.

47. Mr. OLIVENCIA RUIZ (Spain), referring to the term "regulatory setup" in paragraph 14 of the notes, said that if it was meant to include laws as well as regulations, the word "regulatory" was inappropriate.

48. Ms. FOLLIOT (France) said that there was some confusion in the notes between the economic activities under discussion and the legal regimes by which they were governed. The question of whether economic activities should be monopolies or open to competition was quite different from the legislative question of how they should be governed: whether by a permit issued by a public authority or under a contract between a public authority and a private company; it was the latter issue which had legal consequences. Paragraph 7 of the notes was a case in point: it stated that "a service provider operating under monopolistic conditions is typically able to fix prices", but a contract between a public authority and a private company acting alone to provide a public service must in fact exclude price fixing.

49. Mr. GUISLAIN (Observer for the World Bank) said that, while the United States representative was correct in suggesting that the recommendation should refer to highways, bridges and tunnels, he wished to point out that such infrastructure services were not always natural monopolies.

50. Replying to the representative of France, he observed that there was no absolute way of doing things; different countries simply had different legal traditions. For example, while a certain matter might be governed by a contract in one country, the same matter might be governed by a unilateral decision in another.

51. With regard to the interaction between economic policy and legal provisions, it was important to bear in mind that the Commission was discussing a topic that was evolving constantly. Over the past 15 years, tremendous changes had occurred in the area of private infrastructure; those changes had been driven by economic, technological and policy considerations. It was vital for legislators to understand overall trends in order to be able to adopt legislation that was consistent with such trends.

52. Paragraph 7 of the notes began with the phrase "From a policy perspective". That phrase indicated that the section in question highlighted economic and policy matters, while legal aspects were discussed later. It was important to

have an understanding of economic and policy matters, and of the legislative aspects that should be derived from those overall policy perspectives. The French translation of "From a policy perspective" as "Du point de vue de la politique d'Etat" was very awkward.

53. Mr. LAMBERTZ (Observer for Sweden) said that he believed that the wording "the removal of other legal impediments to competition" in recommendation 2 went too far. Such wording made it possible to claim that strict environmental law requirements or strict requirements for maintaining financial stability were legal impediments. In order to avoid any misunderstanding, he proposed the addition of the words "which can be justified by strong public interests" after "legal impediments to competition".

54. Mr. LALLIOT (France) supported the proposal made by the observer for Sweden. With regard to the comments made by the observer for the World Bank, he was not convinced that current trends were completely opposed to the monopolistic system. For example, in December 1997 the Court of Justice of the European Communities had handed down a ruling on the electricity and gas monopolies in four European countries, including France. In its ruling, the Court had recognized the monopolistic nature of the electricity and gas sectors. Referring to the Treaty establishing the European Economic Community (Treaty of Rome), he noted that, until the end of the 1980s, emphasis had been placed on articles 85 and 86, which dealt with competition; since the beginning of the 1990s, the emphasis had been on article 90, paragraph 2, which dealt with services of general economic interest. It was important to take great care and to adopt formulations and positions that were nuanced.

55. Ms. PIAGGI de VANOSSI (Argentina) said that, in the Spanish version of recommendation 2, the word "prueba" should be replaced by "prohiba".

56. Ms. GUILLEN (Observer for Venezuela) said that, in the Spanish version of the first sentence of paragraph 26, it was not clear what was meant by the words "prestados por contrata". In the first sentence of paragraph 27, she requested an explanation of the word "compartimentalizar".

57. Mr. ESTRELLA FARIA (International Trade Law Branch) said that, in paragraph 26, the Spanish text should probably be amended to read "prestados por contrato". In paragraph 27, the word "compartimentalizar" had been used in the sense of "dividir".

58. Mr. LIU Yang (China), referring to paragraphs 14 and 15, said that sometimes, owing to a number of considerations, States might control immature industries and not open them up to foreign investment. From the point of view of private investors, such a policy could perhaps be considered a barrier or impediment. However, in terms of making use of foreign capital to develop industries, China could not view such State policy as an obstacle. His delegation therefore believed that the wording of paragraphs 14 and 15 should be more neutral.

59. Ms. GUREYEVA (Russian Federation) said that her delegation supported the proposal made by the observer for Sweden. She wished to know when delegations

would have an opportunity to study all the proposed amendments to the draft guide.

60. Mr. HERRMANN (Secretary of the Commission) said that, at the next session of the Commission or a working group thereof (if one was established), delegations would be able to consider a revised version of the chapters that the Commission had discussed at its current session. Delegations would also have an opportunity to consider most of the proposals when they assisted the Rapporteur in drafting the Commission's report. Since the draft guide was much longer than a statute or a convention, it was not possible for the Commission as a whole to take part in its drafting. The real drafting of the text could be done only by a limited number of people.

61. Mr. CHOUKRI (Observer for Morocco) said that his delegation supported those delegations that were not in favour of abolishing all legal barriers to competition. All countries had strategic sectors, such as natural resources, that could never be privatized. His delegation would prefer milder wording which referred to the possibility of having the private sector participate in the operation of public infrastructure.

62. Mr. KHAN (United States of America), commenting on recommendations 4 and 5, said that the section on transitional measures, contained in paragraphs 32 to 35 of the notes, did not adequately address the restructuring of utilities and their operations. Emphasis should be placed on the application of market principles to the operations of utilities. Utilities should be able to manage their finances and operations properly; that objective could be met in a private mode of operation as well as in a public sector mode of operation.

ELECTION OF OFFICERS (continued)

63. Ms. PIAGGI de VANOSSI (Argentina) nominated Mr. Restrepo-Uribe (Colombia) for the office of Rapporteur.

64. Mr. Restrepo-Uribe (Colombia) was elected Rapporteur by acclamation.

The meeting rose at 12.55 p.m.

UNITED
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General Assembly

Distr.
GENERAL

A/CN.9/SR.637
14 May 1999

ORIGINAL: ENGLISH

UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Thirty-first session

SUMMARY RECORD OF THE 637th MEETING

Held at Headquarters, New York,
on Wednesday, 3 June 1998 at 3 p.m.

Chairman: Mr. MAZILU (Romania)

CONTENTS

PRIVATELY FINANCED INFRASTRUCTURE PROJECTS (continued)

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Any corrections to the records of the meetings of this session will be consolidated in a single corrigendum, to be issued shortly after the end of the session.

98-80739 (E)

The meeting was called to order at 3.05 p.m.

PRIVATELY FINANCED INFRASTRUCTURE PROJECTS (A/CN.9/444/Add.3) (continued)

1. The CHAIRMAN invited the Commission to resume its consideration of dra chapter II of the legislative guide on privately financed infrastructure projects (A/CN.9/444/Add.3).

Paragraphs 32-35

2. Ms. GIOIA (Italy) said that the provisions on transitional measures sh be universal in scope and should reflect as far as possible the economic realities of the different States.

3. Mr. RESTREPO-URIBE (Colombia) said that the transition from monopoly t market was a very complex process which had political, social and economic dimensions. While the issues involved were not strictly legal, they nevertheless had a significant impact on the legislative and regulatory framework that governed privately financed infrastructure projects. The recommendations should therefore include a reference to non-legal factors w might have a direct impact on the design, execution and operation of transitional measures.

4. Ms. FC JOT (France) said that while the guide was concerned with lega issues recommendations 4 and 5 attempted to inject a political dimension wh might more appropriately be addressed in the introduction to the guide. Whe State decided to execute a public infrastructure project, it had to make an economic choice, namely, whether to privatize the infrastructure or to reta control through a regulatory body or through contractual arrangements, such the build-operate-transfer (BOT) modality. It would not be appropriate, in view, for the legislative guide to concern itself with matters related to t economic structure of particular States.

Paragraphs 36-49

5. Mr. KHAN (United States of America), referring to paragraph 40, on the geographical division of residual monopolies, said that the rapid evolution technology and the constant search for gr-ater efficiency made the situation with regard to monopolistic sectors a very dynamic one. Monopolies that appeared to be entrenched in a given region on one day might no longer exist next day. In the absence of any discussion on the length of contracts, it s therefore be prudent to resist the temptation to define regional monopolies law.

6. Mr. LALLIOT (France) said that the selection procedures referred to in paragraphs 37 to 39 were based on the assumption that there should be competition. However, some legal systems provided for other procedures for selecting the beneficiary of a public contract which did not rely on competition. Under French law, for example, the c nclusion of a public servi delegation agreement was not subject to the competitive procedures that appl in the case of public contracts. Consequently, paragraphs 37 to 39 should

deleted or additional wording should be inserted to provide for non-competitive procedures for the award of infrastructure contracts. The terms used in the paragraphs in question, such as "bidding" ("appel d'offres") and "award" ("adjudication"), should therefore be changed to reflect the new and broader provisions.

7. Mr. GUISLAIN (Observer for the World Bank) said that the main point behind subsection 4 on controlling residual monopolies was merely to suggest to legislators various models for regulating the behaviour of public service monopolies and preventing abuses. The geographical division of residual monopolies was one such model.

8. Mr. MARADIAGA (Honduras) said that the use of the word "consortia" in paragraph 37 was questionable, since it appeared to imply that companies that were not part of a consortium might be excluded from the bidding process.

9. Mr. ESTRELLA FARIA (International Trade Law Branch) said that the point raised by the representative of Honduras was one of terminology, which would be reviewed by the secretariat.

Paragraph 50

10. Mr. WALLACE (United States of America) drew attention to a slight difference in tone between the way in which the issue of competition was addressed in paragraph 50, on the conditions for the award of licences and concessions, and the way in which it was addressed in paragraphs 37 to 39 and in draft chapter III of the guide. Chapter III and paragraph 50 appeared to provide for some exceptions to the requirement for competition, while paragraphs 37 to 39 did not.

11. Mr. LALLIOT (France) said that, in striving for conciseness, the secretariat had included provisions from different legal systems that governed the award of licences to service providers. There was a need to be more specific and to clarify the differences between the various legal systems on the subject.

Paragraphs 51-61

12. Mr. LALLIOT (France) asked what connection there was between the paragraphs on price and profit regulation (paras. 55 to 61) and the rest of the draft legislative guide.

13. Mr. ESTRELLA FARIA (International Trade Law Branch) recalled that, at its thirtieth session, the Commission had suggested that the guide should include consideration of the issues of different market structures and price regulation. Indeed, the rate of return on investment was an issue of vital importance to the operational phase of a privately financed infrastructure project. Legislators had therefore opted for various price control systems, which were implemented by regulatory bodies established for that purpose.

14. Mr. LALLIOT (France) said that it might have been more appropriate to place the discussion of rates of return on investment in the section of the guide that

dealt with the operational phase of infrastructure projects and with the execution of contracts.

15. Mr. KHAN (United States of America) said that the provisions concerning price regulation all appeared to envisage a scenario in which a public utility had been privatized. There might, however, be a public/private partnership scenario in which the public entity was responsible for the management of the infrastructure project and the private sector entity for its financing. In such a scenario, therefore, the focus should be on cost recovery through proper operation and prudent spending. The subsection on price and profit regulation failed to contemplate the latter scenario.

16. Mr. RESTREPO-URIBE (Colombia) suggested that the word parameters ("parámetros") should be used instead of formulae ("fórmula o baremo") in the second sentence of paragraph 57.

Paragraphs 62-82

17. Mr. RENGER (Germany), referring to the comment by the United States delegation on the subject of coordinating the tone of the document, said that on that level he perceived a clash between recommendations 17 and 15: some of the aims of recommendation 17 could be perceived as political and therefore not in keeping with recommendation 15.

18. Mr. WALLACE (United States of America) reiterated that the Commission might consider moving the discussion of regulatory bodies to proposed chapter VII of the guide, entitled "Operational phase".

19. With reference to the paragraphs on the independence and autonomy of regulatory bodies (paras. 67 to 71), he said that independence and autonomy were two separate phenomena: the regulatory body must be independent from government ministries, whereas it must be autonomous relative to the bodies it regulated. The expression used in connection with the latter form of autonomy was that the regulatory body should not be "captured" by the industry it was regulating. Where capture occurred, so did the possibility of improper payments to regulators.

20. In paragraph 78, consumer protection should be added to the long list of responsibilities of regulatory bodies, specifically, the service provisions referred to in paragraph 62 should be incorporated in paragraph 78.

21. Mr. RESTREPO-URIBE (Colombia) said that in many cases regulatory bodies were municipal, local, departmental or regional authorities and thus operated on a territorial basis in a manner determined by the administrative system in a particular country. Their functions were therefore determined by the way responsibilities had been assigned to them, and they also often lacked the financial, administrative or technical resources to fulfil their functions or to plan, implement or supervise privately financed infrastructure projects, with a direct impact on those projects' success or failure. Those facts should be reflected in the guide, either in the paragraphs under discussion or elsewhere.

22. In connection with the previous speaker's point about consumer protection, it would be worth adding that consumer protection provisions not only should include a reference to the need to provide a minimum level of public service or ensure a minimum level of coverage for certain sectors of the public, but also had to do with the quality of service and the level of access for individual consumers.

23. Ms. MUSOLINO (Australia) said that the use of the word "technical" in the expression "technical grounds" referred to in recommendation 15 and paragraph 70 as being in opposition to political grounds was unfortunate in that, in an Australian context, a technical application of a rule could mean a narrow, literal application of that rule. She wondered if a rewording along the lines of the regulatory body's operating in "objective" or "substantive" application of the relevant laws might be more appropriate.

24. Mr. MORENO RUFFINELLI (Paraguay) supported the suggestion by the representative of the United States concerning the addition of consumer protection to the list of regulatory bodies' responsibilities: the issue was too important to be left ambiguous or unclear. In that connection, he referred to paragraph 15: to the ban on collusion, cartels, predatory pricing and other unfair trading practices should be added a duty of consumer protection.

25. Mr. OLIVENCIA RUIZ (Spain) reiterated that there must be clear terminology in the paragraphs under discussion as elsewhere to distinguish legislation from regulations, laws from rules: the distinction between high-level legislative provisions and lower-level regulations was not always clearly drawn in the text, and to use the word "regulate" or "regulatory body" in such circumstances was likely to cause confusion. It was important to keep clearly in mind the legislative provisions, on the one hand, and, on the other, the lower-level regulatory power regulatory bodies had which enabled them to put those legislative provisions into effect.

26. The title of subsection 3(a), "Range of institutional set-ups" should be amended to read "Institutional mechanisms", as found in the first sentence of paragraph 66.

27. Mr. CHOUKRI (Observer for Morocco) said that in the subsection on regulatory bodies there was too much, intimidating, emphasis on the powers of those bodies and the penalties they might exact for breaches and infringements, and nothing at all on the amicable settlement of disputes, on mediation or arbitration mechanisms, internal or otherwise, or on recourse to a higher authority with control over such regulatory bodies. That lack should be remedied, and the tone of the existing paragraphs should be made less harsh.

28. Mr. GUISLAIN (Observer for the World Bank) said that he agreed that arbitration mechanisms and the like were indeed very important. However, he believed that dispute settlement procedures were satisfactorily covered in the next subsection of the document, entitled "Regulatory process and procedures".

29. There was a broader issue of where in the guide regulation should be covered. He had a preference for dealing with it towards the beginning, rather than in chapter VII as suggested by the representative of the United States.

When a country adopted private funding as a mode of financing infrastructure projects, how the project was to be regulated once it was being implemented was actually one of the fundamental design parameters. He noted that in some countries the regulator had the power to award licences, i.e., "up front" and well before implementation of the project; also, as the institutional design formed part of the overall framework for any project, it was a key decision which governments needed to make before a project could begin or private investors could be attracted. For all those reasons, the issue of regulation should be dealt with at an early stage in the guide.

30. Mr. LAMBERTZ (Observer for Sweden) said that the point made by the representative of Spain concerning clear distinctions between laws and regulations was well taken; bearing in mind that the guide was intended to convey legislative recommendations, he found recommendations such as recommendation 19 out of place. The recommendation might be good advice, but its proper place might be either in the notes or in a more general kind of guide such as the United Nations Industrial Development Organization issued.

31. Mr. GUISLAIN (Observer for the World Bank) said that the World Bank's experience in a wide variety of countries showed the importance of embodying in law the key issues of how a sector was to be regulated, who would regulate it and the procedures for so doing, because investors needed reassurance about regulation at the outset.

32. On the point raised by the Observer for Sweden, he said that the composition of the regulatory body was usually specified in law, for the same reason as he had just put forward: to reassure the investor.

33. Mr. LIU Yang (China) pointed out that in paragraph 26 of document A/CN.9/444/Add.1 one definition of the term "regulatory body" was given. Paragraph 64 of the document under discussion, (A/CN.9/444/Add.3), contained another definition, one which he believed was too narrow. In connection with paragraph 67, he said that isolating regulatory bodies might be conceptually problematic, in view of their function, under the definition in paragraph 26 of document A/CN.9/444/Add.1.

34. Mr. ESTRELLA FARIA (International Trade Law Branch) confirmed that the previous speaker's understanding of the term "regulatory body" from paragraph 26 of document A/CN.9/444/Add.1 was the intended one. The sense given in paragraph 64 of document A/CN.9/444/Add.3 had not been intended to be narrower, and the secretariat would review the text for consistency of usage.

The meeting was suspended at 4.20 p.m. and resumed at 4.50 p.m.

Paragraphs 83-95

35. Mr. WALLACE (United States of America) suggested qualifying recommendation 23 in order to protect companies from having to provide regulatory bodies with proprietary or confidential business information that might be made public. Such exceptions were commonly granted in the regimes of many countries.

36. Mr. OLIVENCIA RUIZ (Spain), replying to the observers for Sweden and the World Bank, clarified that his delegation would have no objection to calling the draft a legislative guide if "law" and "legislation" were broadly defined. Naturally, it would be impossible to specify what constituted law, as opposed to regulations, in every system. If the term "legislative" was understood to mean all the written law of a legal system, the guide could include recommendations of a regulatory nature that applied to subsidiary regulatory bodies; however, particularly in the light of the Spanish equivalent of "legal provisions" contained in paragraph 64 ("las normas de rango legal"), a hierarchy of regulatory provisions must be established.

37. Ms. MUSOLINO (Australia) suggested that, in recommendation 25 and the related paragraph 95, the phrase "limit the causes that give ground to appeals" should be replaced by the phrase "limit the grounds for appeal".

38. Mr. LALLIOT (France) said that the word "appeal" in paragraphs 91, 95 and elsewhere should not be translated into French as "appel" but rather as "recours".

39. The CHAIRMAN invited Commission members to discuss the format of draft chapter II and the possibility of shifting portions of it to other addenda.

40. Mr. ESTRELLA FARIA (International Trade Law Branch) requested Commission members to give the secretariat clear guidance on how to restructure or amend chapter II. Suggestions thus far had dealt with moving portions of text on economic background to the introduction, devoting a separate chapter to the operational phase and toning down the language in certain places. Drafting suggestions and terminology corrections, such as the one just proposed by the representative of France, should also be provided directly to the secretariat.

41. Mr. TELL (France) proposed moving sections A and B of document A/CN.9/444/Add.3, which dealt with questions of political economy, to a non-normative portion of the draft guide, for example the introduction in document A/CN.9/444/Add.1. He stressed that even in the concession of public services or build-operate-transfer (BOT) arrangements, the underlying notion was that the State had a role to play.

42. Sections A and B of document A/CN.9/444/Add.3 should also be summarized and refined - he had already made that point in reference to paragraph 15 and others. A separate chapter might be devoted to the questions explored in section C. When draft chapter II was reorganized, a distinction should be drawn between various forms of State control, such as licences or authorization by regulatory bodies, on the one hand, and the contractual delegation of the management of public service or construction operations, such as concessions, on the other.

43. Ms. NIKANJAM (Islamic Republic of Iran) urged the Commission to call its draft "model legislation" rather than a "legislative guide". "Model legislation" was a more compelling title which would draw the attention of government authorities; guides tended to be relegated to legal advisers and lawyers. Her delegation was satisfied with the content of the draft but would agree to the shifting of certain portions in keeping with the wishes of other

Commission members. However, it strongly opposed deleting any chapters or paragraphs of the text.

44. Mr. WALLACE (United States of America) said that his delegation was not in favour of deleting any portion of the text either but agreed with the delegation of France that certain portions of draft chapter II should be moved. He suggested an introduction, informing countries that their lawmakers must take strategic decisions concerning economic governance, followed by an annex containing all of sections A and B and all of section C up to paragraph 82 on the budget of the regulatory body. The annex should deal with policy, law and regulation, regulation having the meaning of subsidiary legislation used by the representative of Spain. The annex would explain the strategic decision to be taken by legislators: whether to restrict the economic governance of their countries to policy alone or whether to embody it in laws and regulations. The operation of regulatory bodies, including questions of tariffs, consumer protection and safety, could be discussed in proposed chapter VII of the guide, on the operational phase.

45. Mr. ESTRELLA FARIA (International Trade Law Branch) expressed concern that the inclusion of an annex might create the impression that the Commission did not feel comfortable about adopting certain provisions within the body of the main text. Indeed, UNCITRAL had never adopted a text accompanied by such an annex.

46. Mr. WALLACE (United States of America) said that his delegation was not extremely concerned about the form of the final version of chapter II.

47. He agreed with previous speakers that the content of the middle part of, or annex to, the chapter differed from the usual subjects handled by the Commission. The annex, which would require further elaboration to provide a clearer distinction between the elements involved, should be followed by the text dealing with regulatory process.

48. Ms. ALLEN (United Kingdom) said that she shared the views expressed by the representatives of France and the United States. She noted that sections A and B of document A/CN.9/444/Add.3 covered rather sensitive areas of public law, and she agreed that section C, which differed greatly in character from the two previous sections, should be placed later in the guide.

49. Mr. GUISLAIN (Observer for the World Bank) said that the draft chapter under discussion was a complex and interesting multidisciplinary blend of public and private laws, and that it was intended to provide legislators with a comprehensive guide on private sector involvement. To a greater or lesser extent, the concepts reflected in the legislative recommendations already appeared in the domestic legislation of many countries which sought to maintain stability and reassure investors that the environment in which they operated would not change overnight.

50. It was advisable not to divide the text into increasingly smaller sections; it was sufficient to use sections A and B as an introduction, to be followed by a discussion of operations, in section C. Furthermore, section C would be incomplete without some prominence being given to the subject of regulation.

51. Mr. RESTREPO-URIBE (Colombia) said that the draft chapter had the merit of taking into account the direct relationship between the policy, economic, legal and subsidiary regulatory aspects of sector structure and regulation.

52. Mr. CHOUKRI (Observer for Morocco) said that his delegation supported the idea of preserving the unity of the chapter, and saw little need for annexes. However, the pursuit of coherence should not exclude the possibility of restructuring the text to enhance coordination between the various sections.

53. Mr. LALLIOT (France) said he agreed with the proposals made by the representative of the United States, and that there was indeed a strategic decision involved. He was fully aware that relegating certain paragraphs to an annex might raise the issue of the status of annexes.

54. It was immaterial whether the terms "law", "legislation", or "regulation" were used; what was most important was that there should be no doubt that the rules contained therein were mandatory. All contracting parties needed the reassurance of a stable legal regime that would not undermine investments.

55. The discussion of regulatory bodies and the whole of section C should be shifted to the end of the document, but in order to preserve the internal consistency of the document, the text should not be further subdivided.

56. He cited Colombian legislation in the telecommunications and transport industries which had established a system of licensing and regulation, as envisaged by the Commission.

57. There was room for improvement in the case of document A/CN.9/444/Add.3, but rather than deleting sections, it would be preferable to reorganize the material and insert the few missing points.

58. Ms. GUREYEVA (Russian Federation) suggested that if there were lingering doubts about the competence of the Commission to discuss economic problems in the current document, perhaps the advice of the Office of Legal Affairs could be sought.

59. She said that the Commission should not attach undue importance to the structure of the document under discussion, nor should it specify in which laws States should include provisions. Priority should be focused on producing a comprehensive document which would be understood by the end-user. She doubted whether striving to improve the document would bring the Commission closer to the desired objective.

60. Ms. GIOIA (Italy) said that the text should be amended by rearranging some parts and redrafting others. In both cases, the changes should take account of the function and purpose of the guide, namely, to offer suggestions on the rules intended to govern privately financed infrastructure transactions.

61. Mr. WALLACE (United States of America) endorsed the comments made by the representative of Italy.

62. He said that he agreed with France that it was not necessary to further subdivide the text; in that regard, his delegation was open to other solutions. Sections A and B should include legislative recommendations without going into details.

63. He reiterated the need to remind policy makers of the desirability of a strategic decision, by means of either a policy statement or legislation. Ideally, the introduction should draw the attention of the reader to the need for States to make strategic decisions on how they wished to proceed, and to consult the relevant parts of the document where applicable.

The meeting rose at 6 p.m.

UNITED
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General Assembly

Distr.
GENERAL

A/CN.9/SR.638
17 May 1999

ORIGINAL: ENGLISH

UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Thirty-first session

SUMMARY RECORD OF THE 638th MEETING

Held at Headquarters, New York,
on Thursday, 4 June 1998, at 10 a.m.

Chairman: Mr. MAZILU (Romania)

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PRIVATELY FINANCED INFRASTRUCTURE PROJECTS (continued)

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98-80745 (E)

The meeting was called to order at 10.10 a.m.

PRIVATELY FINANCED INFRASTRUCTURE PROJECTS (continued) (A/CN.9/444/Add.4)

1. The CHAIRMAN invited the Commission to begin consideration of draft chapter III of the legislative guide, entitled "Selection of the concessionai (A/CN.9/444/Add.4).

Paragraphs 1-5

2. Mr. WALLACE (United States of America) praised the organization and structure of chapter III. As the purpose of the legislative guide was to hel host countries stimulate the flow of capital in order to develop their infrastructures, the Commission's aim was presumably to eliminate obstacles which stood in their way. One of those obstacles could be removed by providi an appropriate legislative framework. Since another obstacle was the excessi time devoted to contracting, the selection process would serve the interests Governments by enabling them to conclude agreements more speedily, a point th could be brought out more forcefully at the beginning of the draft.

3. It was not entirely clear in the document whether competitive selection intended to apply to all privately financed infrastructure projects, as he wo prefer, and whether it should be regarded as the norm. In addition, the term used for the would-be concessionaire should be carefully chosen. The text referred alternately to the "candidate" and the "proponent", and the term "tenderer" also appeared in paragraph 2 of the notes. However, the UNCITRAL Model Law on Procurement of Goods, Construction and Services drew a clear distinction between tendering, as the preferred method of selecting supplier goods and construction, and the services method. Thus, the selection of a project company was not a form of tendering, but a method of choosing the provider of a global service, and the term "tendering" should therefore be avoided.

4. Mr. RESTREPO-URIBE (Colombia), referring to paragraph 3 (a), said it wa important to clarify that the purchase of shares was one method of taking control of a public utility company established as a share company.

5. Mr. LALLIOT (France) agreed with the representative of the United State America that the principle of competition should govern the selection proced provided that the terms used in reference to competition were clearly define In French law, and in European Union law, "competition" or "concurrence" app specifically to public contracts but was excluded for several of the practic envisaged in the draft guide for build-operate-transfer (BOT) contracts, suc pre-selection negotiations and the alteration of specifications, a practice contemplated in recommendation 10. Because the notion of competition as use the text embraced such practices, the French term "concurrence" should not b used as an equivalent; he suggested as an alternative "transparency", which already used in the draft guide, for example in recommendation 22. That was concept familiar to French and European law and to the case law of the Europ Court of Justice, as a requirement of the contracting process for concession for public works.

6. Price was not the only criterion to be considered in awarding contracts; there were others, such as technical capacity to perform the work in question. The reference in paragraph 2 to the UNCITRAL Model Law might therefore be misleading, unless due emphasis was placed on the mutatis mutandis provision.

7. Mr. CHOUKRI (Observer for Morocco) said that paragraph 2 should include a reference to the fact that many States had not yet applied the UNCITRAL Model Law, and had legislation that was at variance with it. Moroccan law, for example, stipulated that a private investor must give guarantees of performance. UNCITRAL had in fact prepared a convention on guarantees, and there should be some mention of them in the draft guide.

8. In paragraph 3 it should be made clear that States, unlike individuals, could make bonds or shares in public utility enterprises available for purchase only after legislation had been enacted for the purpose.

9. Mr. LAMBERTZ (Observer for Sweden) drew attention to paragraph 1, which stated that the guide expressed "a clear preference for the use of competitive selection procedures". He did not object to that statement, but he did feel that the legislative character of the draft guide was being watered down and that the draft was being turned into a compendium of general advice. The Commission, he recalled, had initially debated whether there was any purpose in taking up the subject of private financing for public infrastructure projects when the United Nations Industrial Development Organization (UNIDO) had just finished work on the same subject. It had been pointed out that the work done by UNIDO was not of a legislative character. Yet the Commission now seemed to be engaged in preparing a general, rather than a legislative, text, and he wondered whether that was the right approach. The Commission should avoid recommending the procurement procedures set out in the draft guide as if they were the only possible ones and allow for the fact that direct negotiations would often be the chosen method.

10. Mr. OLIVENCIA-RUIZ (Spain) objected to the reference in paragraph 1 to "project consortia". The parties bidding for the contract did not necessarily form a consortium, at least not until the contract was concluded. In paragraph 3 (a) of the Spanish version, the term "obligaciones" was not the correct rendering of "shares".

11. Mr. RESTREPO-URIBE (Colombia) agreed that the term "shares" should not be translated as "obligaciones".

12. Mr. LIU Yang (China) said that neither method of choosing the concessionaire - competitive selection and direct negotiations - should take precedence over the other. In some countries, owing to the cost of tendering, there were few prospective concessionaires, and direct negotiations were a better method.

13. Mr. ESTRELLA FARIA (International Trade Law Branch) said that the comments of Commission members made it clear that the terms "competitive method" and "competition" had a more precise connotation in some legal systems than they did in the text of the draft guide. In the guide, "competition" was used to

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designate a method of comparing different proposals. Although the draft guide had been inspired by the UNCITRAL Model Law on procurement, the procedures outlined in the guide were not the same as those in the Model Law. He recalled also that some countries, especially in Latin America, made no specific provision for privately financed infrastructure projects, but simply applied their general laws on procurement.

14. While the draft guide provided for a particular type of procurement, it would be useful to learn from Commission members what other kinds of emphasis were needed. As for the respective priority accorded to competitive selection and direct negotiations, the draft guide did mention that the practice of direct negotiations was followed in some countries and referred to the circumstances in which they might be warranted. In preparing chapter III, a task undertaken with the assistance of experts and in consultation with other organizations such as UNIDO and the World Bank, it had been thought necessary to offer a particular solution for a particular kind of procurement problem, rather than merely describing the various possibilities. There had been no intention of excluding alternative methods.

15. Mr. LALLIOT (France) said that the term "compétition" would be the best variant in French for the English term "competition". "Tendering", which had been rendered "appel d'offres" in the French version could be replaced by the term "appel de candidatures", and "the awarding authority" might become "l'autorité concédante" or "l'autorité attributrice".

16. As for the issue of direct negotiations versus competitive selection, it was important not to confuse two different extremes. The public contracting procedure gave the contracting authority less room for manoeuvre than did the principle of intuitis personae, which applied to delegated contracts and which, it was believed, tended to encourage arbitrary rather than discretionary decisions. An intermediate solution was needed in order to meet the twin objectives of informed choice and transparency. Such a solution might be to specify the need for a preliminary stage in which the contract had to be publicly advertised and bids invited, while not excluding the possibility of direct negotiations with the candidates at a later stage.

17. Mr. WALLACE (United States of America) said that the concerns expressed by the observer for Sweden could be accommodated by some redrafting along the lines of the last sentence in paragraph 17, emphasizing the legislative character of the proposed model for competitive selection procedures. In many countries, the key problem with major infrastructure projects was precisely the lack of transparency and non-competitive nature of the procedures used, which exposed civil servants to criticism. However, the guide was in no way intended to impose any kind of straitjacket on legislators, and there was in fact plenty of scope for direct negotiation. As for the Model Law, it reflected a definite philosophy already endorsed by the General Assembly. The Commission was simply embracing that philosophy by seeking to devise a legally framed method applicable to BOT projects.

18. Mr. CHOUKRI (Observer for Morocco) said that while he understood the terminological difficulties raised by the representative of France, the translation into Arabic of terms based on the UNCITRAL Model Law was

satisfactory. In his experience, a concessionaire selected through an orderly and honest competitive bidding process was likely to be the one which had offered the best price and the most guarantees.

19. Mr. LAMBERTZ (Observer for Sweden) said that the more neutral wording suggested by the representative of the United States met the concerns of his delegation. He would, however, prefer a stricter formulation for the recommendations and expansion of the portion of the text on direct negotiations.

20. Mr. LIU Yang (China) said that, when appropriate, China used the selection method, but when the number of participants was high, it adopted an open and transparent selection method involving competitive bidding. Thus far it had carried out several successful BOT projects, but in most of those cases, only one company had expressed interest or submitted a proposal. It was not that the Government did not provide an enabling environment, but that the competitive market simply did not yet exist. In paragraph 3 (a) of the notes, a preference for competitive selection could be expressed without excluding direct negotiations with project consortia or companies.

21. Mr. ESTRELLA FARIA (International Trade Law Branch) said that the Secretariat had contemplated a situation where only one bidder might be interested. Without prejudice to later decisions, the commission might wish at the least to include a reference to the later discussion of that proposal in that paragraph.

22. Mr. OLIVENCIA-RUIZ (Spain) said that in discussing legislative options the preference for competitive selection methods should be maintained, but with an explicit mention that direct negotiations had not been ruled out. Transparency as a fundamental principle was the most important aspect of the process and applied in all cases.

Paragraphs 6-14

23. Mr. WALLACE (United States of America) drew attention to paragraph 10 and said that in order to increase confidence in the selection process, and in the interests of transparency, a competitive method must be used. Direct negotiations could raise questions about integrity. Turning to paragraphs 12 to 14, he said that allowing a bidder to challenge a selection process promoted greater transparency through the need for record-keeping. The requirement to protect proprietary information should be highlighted in that section as well.

24. Ms. GUREYEVA (Russian Federation) said that using a more neutral term than "consortia", such as "project organizations", might widen the circle of potential candidates. She found the reference to policy objectives in the first sentence of paragraph 12 too strong. While the competitive bidding process must be open and transparent, confidentiality must be ensured.

25. Mr. GUISLAIN (Observer for the World Bank) suggested that the first sentence of paragraph 8 could be replaced by the following: "Foreign participation is healthy in general and is in many countries required by law, either pursuant to national legislation or to international treaties or agreements a country may have entered into." It should be borne in mind that

the main reason for having the private sector provide infrastructure services was to obtain better services at better prices. If the best operators were foreign, then national companies should not be protected from competition. The entire economy would thus become more competitive, and consumers would be better served in the end. Furthermore, infrastructure contracts should include clauses requiring discretion.

26. Mr. LALLIOT (France) said it was important to recall that the basic objective for awarding contracts was to ensure continuity of public services and equality of users. It seemed appropriate to include a reference to the need for confidentiality and the right to challenge or recourse in paragraph 10. Some of the terms used in the French version did not correspond with the English version, in particular "responsabilité redditionnel" for "accountability" (para. 13) and "minime" for "minimal" (para. 9), and more appropriate translations were needed.

27. Ms. GIOIA (Italy) said, that some of the many different terms used to define the parties included "States", "Governments", "host Government" and "awarding authority". Perhaps "host Government" should apply only to transnational transactions. Likewise, in paragraph 8 the private party was referred to both as a consortium and a company. Those terms needed clarification.

28. Mr. ESTRELLA FARIA (International Trade Law Branch) said that in most of the projects covered by the guide, a large group of companies submitted bids jointly; that was the meaning given to the term "consortium". He preferred to limit the use of the term "company" to a particular entity which had been established to carry out a project. It was difficult to find a single term in French which conveyed the meanings given to "State", but the term "host Government" did emphasize the transnational element of a project.

29. Replying to the observer for the World Bank, he explained that paragraph 8 had been drawn from previous discussions during the preparation of the Model Law on procurement. He saw that paragraph as a mere statement of fact that some countries found foreign participation advantageous.

The meeting was suspended at 11.30 a.m. and resumed at noon.

30. Mr. GILL (India) said that paragraph 11 expressed the concern that selection proceedings were often time-consuming and expensive; in some countries, the longer they lasted, the more gifts were exchanged. The paragraph should therefore recommend that a time-limit should be placed on selection proceedings. Furthermore, paragraph 6 should stipulate that the established methods and procedures of host countries should take precedence over new methodologies applied to individual cases.

31. Ms. NIKANJAM (Islamic Republic of Iran) agreed with the representative of Italy that the use of the word "State" should be reconsidered. Although in United Nations usage it meant the Government, people and country as a whole, in domestic systems it often referred only to the executive power.

32. With regard to paragraphs 10 and 11, the Russian and French delegations had raised important points. It might prove useful to suggest that countries should set out provisions describing the nature of the companies they preferred; infrastructure companies had a right to know a country's preferences before joining in a competitive process.

33. Mr. RESTREPO-URIBE (Colombia) said that an important element of transparency was the effort to eliminate corruption. The Commission should perhaps consider recommending that contracting entities and contractors should enter into integrity agreements stipulating that they would refrain from any activities that would prejudice the fairness of the selection process. That proposal might be incorporated either into section 2, which dealt with the matter of integrity and confidence, or into section 3, which addressed the matter of the transparency of laws and procedures.

34. Mr. CHOUKRI (Observer for Morocco) said that the effort to eliminate corruption involved the interests of both the contracting entities and the host Government. He could not say how many countries had incorporated the UNCITRAL Model Law on International Commercial Arbitration into their domestic legislation; most States did, however, have anti-corruption laws. Integrity, confidence and transparency could not be achieved without a system of judicial oversight. The legislative guide should recommend prompt prosecution of all violations of the integrity of the selection process.

35. Mr. TELL (France) said he welcomed the concern raised by the representative of Colombia. He was not sure, however, what sort of agreement had been meant. The matter of corruption had been dealt with elsewhere in the guide, and a number of international agreements had been cited. Any further reference to corruption should be carefully coordinated with earlier references. The section dealing with the transparency of laws and procedures might be the appropriate place to suggest that States should address the matter of corruption in legislation governing the selection of concessionaires.

36. Mr. RESTREPO-URIBE (Colombia) said that his delegation was well aware that the problem of corruption affected not only the selection of contractors, but public administration in the broadest sense. He had been referring not to international treaties, but to an increasingly common practice among contracting entities and contractors, namely, the conclusion of agreements in which both parties undertook to refrain from actions which would influence the selection process.

37. Mr. ESTRELLA FARIA (International Trade Law Branch) said that the proposal put forward by Colombia was not a new idea: in fact, the UNCITRAL Model Law on Procurement of Goods, Construction and Services prohibited inducements from suppliers and contractors, and established that such inducements should be considered grounds for disqualification.

38. Mr. OLIVENCIA-RUIZ (Spain) said that the sections dealing with the questions of integrity and transparency were complementary: the promotion of integrity and confidence depended on the clarity of laws and procedures. The English term "accountability" had indeed been surprisingly translated into French; the Spanish translation, "rendición de cuentas" was better. He would

prefer, however, the classical Spanish term "cuenta y razón", which subsumed the concepts of both accountability and responsibility.

39. Paragraph 10 stipulated that a selection system should contain provisions to discourage unintentional and intentional abuses of the selection process. The representative of the Secretariat had aptly noted that the UNCITRAL Model Law on procurement took up that matter; in his view, elements of the Model Law should be incorporated into the chapter under discussion. He agreed with the observer for Morocco that the Commission should not only envisage measures to prevent corruption, but should also recommend the establishment of punitive sanctions against parties that engaged in corruption. UNCITRAL was a judicial body, and there was nothing more illicit than corruption; all UNCITRAL texts should emphasize the basic principle that acts of corruption should be punished. Furthermore, the United Nations and other international bodies were seeking to cultivate international awareness of the need to combat corruption, and UNCITRAL should participate in that process.

40. Mr. WALLACE (United States of America) said that the aim was to reduce corruption by developing an open, tightly designed selection system that would provide for the most objective selection methods possible. Although some degree of discretion was inevitable in dealing with such complex projects, it should be channelled and disciplined so as to minimize the potential for corruption. Ideas such as the "islands of integrity" proposed by the non-governmental organization Transparency International or pledges to refrain from engaging in corrupt practices were not reliable solutions. While he agreed with the representative of Spain that enforcement was important, most countries already had laws against bribery and other forms of corruption; the Commission's task was to develop a selection system that would effectively achieve its purposes while minimizing opportunities for corruption.

41. Mr. Sung-Kyu LEE (Observer for the Republic of Korea) said that he welcomed the text's emphasis on the issue of transparency, which did not always receive the attention it deserved. Transparency was important for guaranteeing not only equality among applicants, but also the integrity of the host Government and its accountability to the public at large. He supported the proposal by the representative of France that the reasonable exercise of discretionary power should be monitored. He also shared the views expressed by previous speakers on the need to protect the confidentiality of business information.

42. Mr. MARADIAGA (Honduras) said that he welcomed the attention given to the problem of corruption, which was a destructive phenomenon that had plagued the vast majority of Latin American countries. In the second sentence of paragraph 10, the words "reduce or discourage" were not strong enough; the paragraph should refer instead to the eradication of abuses of the selection process, which was the primary aim of transparency. He agreed with the representative of France that restrictions should be placed on discretionary powers.

43. Ms. LALLIOT (France) said, with respect to the question of confidentiality, that it was important not only to guarantee transparency, but also to take the interests of companies into account. Problems could arise if the records of selection proceedings referred to in paragraph 13 were detailed to the point of

including information on the specific qualifications or shortcomings of individual proponents. Instead, the awarding authority should agree to provide proponents whose offers were rejected with a written explanation of the decision, on the basis of which such proponents could exercise their right to seek review. Otherwise, transparency measures could defeat their own purpose. For example, some qualified candidates might refuse to submit proposals for fear that their techniques or procedures would be disclosed to their competitors.

Paragraphs 15-25

44. Mr. GUISLAIN (Observer for the World Bank) said that the second sentence of paragraph 17 did not accurately describe World Bank procedures and should be changed to reflect what was correctly stated in the footnote pertaining to that sentence. He did not understand what was meant by the indication, in paragraph 22, that the private sector would bear the risks that might result from the inadequacy of the technical solutions used. Governments might wish to stipulate, as a key requirement for many projects, that they would accept only tested technical approaches that had a track record of successful application in other cases.

45. In paragraph 24, it was important to distinguish between qualification and evaluation criteria. For example, the fourth sentence of that paragraph might refer to either qualification or evaluation criteria, depending on the selection method used. Lastly, he was concerned about the reference to negotiation in the final sentence of paragraph 25. Negotiations conducted after a contract had been awarded could result in a situation in which the selected project consortium's ranking would have been different had the initial bid been made on the amended terms. Accordingly, the sentence should specify that such negotiations were to be held only on non-substantive issues.

46. Mr. ESTRELLA FARIA (International Trade Law Branch) said that paragraph 17 would be corrected. With respect to the last sentence of paragraph 22, he explained that, under more traditional procurement procedures, candidates were invited to submit bids that conformed to specifications drawn up by the awarding authority, which also chose the technology to be used. However, under a system that invited more innovation and initiative from the private sector, the responsibility and liability for the proposals necessarily shifted to the private sector, irrespective of any requirement that the technology used must have been tested previously.

47. With respect to paragraph 25, the extent to which negotiations were appropriate after a project had been awarded was discussed later in the notes. The overall philosophy was that negotiations should not be used as a means of subverting the reasons and criteria pursuant to which the project had been awarded to a given consortium.

48. Mr. LALLIOT (France) said that paragraphs 15 to 25 were well balanced. The word "exécuteur", which appeared in the first sentence of paragraph 21, had more than one meaning; a more precise term should be substituted. In addition, the expression "maître d'ouvrage" would be more properly rendered as "maître d'oeuvre". Lastly, the terms "intrants" and "extrants", which were translations of the terms "inputs" and "outputs", were unclear and should be changed.

49. Mr. WALLACE (United States of America) said that legislative recommendation 2 was related to the technical issue of prequalification policy. However, paragraph 20 of the notes, which related to that recommendation, was not sufficiently clear in that regard. Although the normal practice was to send out a prequalification questionnaire and to invite all qualified candidates to submit proposals, recommendation 2 implied that procuring entities that did not wish to deal with a large number of proposals might decide to negotiate with only three or four candidates in the short term. However, that practice would violate one of the World Bank's procurement rules. Moreover, it must be borne in mind that, as the selection process progressed, the procuring entity might change its view of the desired parameters of the project in question and, accordingly, its view of whether or not a given bidder was qualified. In the last sentence of paragraph 20, the word "therefore" was inappropriate, as the sentence did not, in fact, sum up the points made by the preceding sentences.

50. Mr. LAMBERTZ (Observer for Sweden) said that he questioned the advisability of including recommendations 1 and 2 in the legislative guide. Instead, recommendation 1 should become an introductory paragraph; the word "normally" should be inserted before "advisable" and the second sentence should be replaced with the words "The guide therefore contains legislative recommendations which relate primarily to such methods".

51. Recommendation 2 was not really a legislative recommendation, but rather a piece of advice on a less important issue, which could be included either in another text or in the notes on the legislative recommendations. Moreover, since article 7 of the UNCITRAL Model Law on Procurement of Goods, Construction and Services indicated only that "the procuring entity may engage in prequalification proceedings", the legislative guide should not recommend the use of such proceedings.

The meeting rose at 1.05 p.m.

UNITED
NATIONS

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General Assembly

Distr.
GENERAL

A/CN.9/SR.639
14 May 1999

ORIGINAL: ENGLISH

UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Thirty-first session

SUMMARY RECORD OF THE 639th MEETING

Held at Headquarters, New York,
on
Thursday, 4 June 1998, at 3 p.m.

Chairman: Mr. MAZILU (Romania)

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PRIVATELY FINANCED INFRASTRUCTURE PROJECTS (continued)

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Corrections should be submitted in one of the working languages. They should be set forth in a memorandum and also incorporated in a copy of the record. They should be sent within one week of the date of this document to the Chief, Official Records Editing Section, room DC2-750, 2 United Nations Plaza.

Any corrections to the records of the meetings of this session will be consolidated in a single corrigendum, to be issued shortly after the end of the session.

98-80751 (E)

The meeting was called to order at 3.05 p.m.

ELECTION OF OFFICERS (continued)

1. Mr. TELL (France) nominated Mr. Renger (Germany), Mr. LEE (Singapore) nominated Ms. Nikanjam (Islamic Republic of Iran) and Mr. ENIE (Observer for Gabon) nominated Mr. Enouga (Cameroon) for the three offices of Vice-Chairman.

2. Mr. Renger (Germany), Ms. Nikanjam (Islamic Republic of Iran) and Mr. Enouga (Cameroon) were elected Vice-Chairmen by acclamation.

PRIVATELY FINANCED INFRASTRUCTURE PROJECTS (continued) (A/CN.9/444/Add.4)

3. The CHAIRMAN invited the Commission to resume its consideration of draft chapter III of the legislative guide on privately financed infrastructure projects (A/CN.9/444/Add.4).

Paragraphs 15-25

4. Mr. OLIVENCIA RUIZ (Spain) thanked the secretariat for the terminological explanations provided. He said that his delegation could accept the proposal of "company" ("compañía") or "corporation" ("sociedad") to designate concessionaires in privately financed infrastructure projects. However, it was very important to standardize the terminology used throughout the document.

5. He also concurred with the choice of the Spanish term "empresa" ("company") in paragraph 16. However, he objected to the translation of "maître d'ouvrage" in paragraph 21, as "maestro de obra", which should be replaced by "dueño de obra" or "contratista".

6. Mr. CHOUKRI (Observer for Morocco) said that the continuation of negotiations between the awarding authority and consortia throughout the duration of the concession was not a new phenomenon. He asked the secretariat to amend the text to make it clear that negotiations on unforeseen or emergency situations, or matters which were not covered in the guide, should not be construed as a revision of the content of the contract or its terms. Nor should they be viewed as a reopening of contract negotiations.

7. Mr. ESTRELLA FARIA (International Trade Law Branch) asked the Observer for Sweden to elaborate on his query relating to legislative recommendation 3.

8. Mr. LAMBERTZ (Observer for Sweden) said that recommendation 3 was substantively sound and he did not object to its wording, but he wondered whether it was suitable for inclusion in the legislative guide.

9. Mr. KOVAR (United States of America) said that he agreed with the Observer for Sweden. The ultimate purpose of recommendations should be the primary consideration.

Paragraphs 26-32

10. Mr. WALLACE (United States of America) suggested that an explanation should be added to paragraph 31 to illustrate how the precise presentation of standard contract terms would facilitate the entire process, including funding.

11. Ms. GIOIA (Italy) drew the attention of the Commission to the fact that paragraphs 21 to 37 were not directly covered by any of the recommendations.

12. Mr. ESTRELLA FARIA (International Trade Law Branch) explained that investors and lenders had often cited inadequate preparation as a major difficulty they encountered in the bidding process. The secretariat had not been able to formulate a legislative recommendation to address that issue.

13. Mr. GUISLAIN (Observer for the World Bank) said that in addition to appointing the award committee, as highlighted in paragraph 27, it was also important to appoint technical experts and advisers to host governments.

14. He suggested that either "pre-feasibility study" or "preliminary feasibility study" would more accurately convey the intention of paragraphs 28 and 29, since the term "feasibility study" described a very specific and involved process.

15. He asked whether "standard contract", in paragraph 31, referred to a model or a draft contract.

16. Ms. GÜRAY (Observer for Turkey) suggested that section E.3 should be expanded to stress the benefit of involving lenders and guarantors as early as possible in the process.

17. Mr. KOVAR (United States of America) said that feasibility studies should ordinarily be made available to inform bidders of the various factors governments took into account.

18. Environmental impact assessments should be among the considerations in the overall process of feasibility assessment. However, in that connection he drew attention to the intended purpose of the reference to environmental impact in paragraph 68 (d).

Paragraphs 33-46

19. Mr. WALLACE (United States of America), in response to the comment made by the representative of Italy, said that legislative recommendation 2 suggested that the narrowing-down of proposals was covered in paragraphs 19 and 20. Those paragraphs pointed out the inadvisability of open tendering without a prequalification phase; by contrast, paragraph 33 stressed the need for a rigorous procedure to limit the number of prospective proponents. Paragraph 33 should also be clarified to show how prequalification proceedings for privately financed infrastructure projects did not violate any generally accepted prohibitions.

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20. The ability to manage financing and to maintain cordial relations with host governments were important qualification requirements of proponents and as such, should be included in the last sentence of paragraph 36. He also pointed out that article XVI of the General Agreement on Trade in Services, concluded under the auspices of the World Trade Organization, prohibited the type of limitations placed on bidders in the last sentence of paragraph 37.

21. In the final sentence of paragraph 40, the word "advisable" should be replaced by "mandatory".

22. In conclusion, he asked whether paragraphs 41 and 42 applied to the compensation of costs for both successful and unsuccessful bidders.

23. Mr. GUISLAIN (Observer for the World Bank) pointed out that "prequalification" had a specific meaning in the granting of concessions, and that all companies which met the prequalification criteria should be allowed to submit bids. He believed "preselection" was a more suitable term for section 7.

24. Referring to the second sentence of paragraph 35, he said that since the content of the prequalification document could bind the bidder at a later stage it might not be advisable for the proponent to provide too much information on the principal required terms of the project agreement.

25. Furthermore, he found the stipulations in paragraph 44 too strict. For many countries the exercise of bidding for infrastructure projects was a lengthy learning experience, it was therefore important to allow a certain degree of flexibility in the procedure. He was not in favour of the use of a rating system (para. 45), since prequalification was a stage at which a large margin of discretion was acceptable.

26. Mr. CHOUKRI (Observer for Morocco) said that host governments sometimes had an urgent need to establish a particular infrastructure project. The draft guide should therefore provide for the prequalification proceedings to be conducted within a relatively short time-frame and at a reasonable cost. He did not share the view that, where a project could not proceed, the awarding authority should consider arrangements for compensating prequalified proponents. To do so would place an intolerable burden on the treasury of host States, which might seek ways of avoiding the payment and thereby lower the quality of the competition.

27. Mr. WALLACE (United States of America) said that the point just raised by the Observer for Morocco was valid. However, the more efficient the selection process was the lower the cost of participation would be and the less necessary would it be for the guide to provide for compensation arrangements. His delegation was not urging the inclusion in the guide of compensation provisions. It merely wished the guide to draw that aspect of the selection process to the attention of governments.

28. Mr. LALLIOT (France) said that his delegation would be reluctant to support the inclusion in the guide of any provision for preferential treatment to be given to domestic entities, but it could understand why some States might wish to include such a provision. Should the Commission decide to include the

provision, however, it must be carefully formulated so as not to legitimize discrimination on the basis of nationality.

29. With regard to recommendation 6, given the complexity of the contracts involved, the guide should not attempt to legislate every aspect of the criteria, requirements or procedures with respect to the qualifications of project consortia. The principle of negotiation must be respected and a sufficient margin of manoeuvre allowed so that supply could be adjusted to demand and the effectiveness of the entire process thereby enhanced.

30. On the subject of compensating prequalified proponents if a project could not go forward, it was logical to envisage cost-recovery provisions in certain cases, since failure to do so would limit the interest of potential applicants.

31. Lastly, users might find it easier to follow the legislative guide if references to other texts, such as the UNCITRAL Model Law, restated the provisions of the text in question instead of merely citing the article in which it was contained.

32. Ms. ZIREYEVA (Russian Federation) asked whether the statement in paragraph 38 that "interested companies typically participate in the selection proceedings through consortia especially formed for that purpose" meant that only consortia of companies could participate in the proceedings. If that was the case, then the first sentence of paragraph 18 was unnecessary.

33. She noted that most of the guarantees provided in the guide were for the benefit of the host government. It was also important to provide guarantees for the benefit of the project consortia.

34. Lastly, the guide should make it clear whether the private sources of financing for infrastructure projects to which it referred were foreign or domestic. The references appeared to be to foreign sources of financing.

35. Mr. ESTRELLA FARIA (International Trade Law Branch), responding to the last point raised by the representative of the Russian Federation, said that the guide was neutral on the subject of the sources of financing. It was certainly not the intention to exclude the possibility of financing by local sponsors. The question concerning the establishment of consortia appeared to have been prompted by the choice of Spanish terms used to render the English original, which was quite clear.

Paragraphs 47-65

36. Mr. WALLACE (United States of America) said that following the submission by project consortia of proposals relating to broad output specifications and contractual terms, it was unclear whether the next stage consisted of negotiations or discussions between the proponent and the awarding authority, prior to the revision of the proposals. With reference to paragraph 56, he wondered whether there was any real need for alternative proposals if the selection proceedings were divided up into two stages. Lastly, paragraphs 61 and 64, which referred to procedures for clarification did not make it clear when such clarification took place.

37. Mr. ESTRELLA FARIA (International Trade Law Branch), responding to the points raised by the representative of the United States, said that the awarding authority discussed initial proposals with their respective proponents, following which it invited the proponents to submit final proposals that took account, where applicable, of the revised specifications and contractual terms. The alternative proposals provided for in paragraph 56 were subject to the caveat contained in the last sentence of paragraph 47. Lastly, on the question of when clarification of the request for proposals took place, paragraph 61 simply stated that the request for proposals must provide information on the means by which project consortia might seek clarifications of the request for proposals, while paragraphs 64 and 65 established the procedures for doing so.

38. Mr. RENGER (Germany) noted that recommendation 8 was entitled "Initial request for proposals", while the body of the recommendation referred to structuring the proceedings for requesting proposals in two stages. An effort should be made to ensure consistency between the title and the text of the recommendation.

39. Mr. GUISLAIN (Observer for the World Bank) noted that there were different ways of implementing a two-stage selection procedure. While a unified bidding document usually emerged by the completion of the second stage, in some systems the awarding authority might still allow a degree of flexibility in the final proposal; the guide should therefore include provision for the latter approach. He agreed that the word "negotiations" in paragraphs 51 and 52 should be replaced by "discussions".

40. In formulating its revised specifications, the awarding authority should not indicate a preference for any specific design or technology so as not to exclude any proponent. It should, however, provide that even where the facility reverted to the government after the end of the concession period, it must continue to meet certain output requirements.

41. On the subject of ancillary revenue sources, few infrastructure projects could be wholly funded from the revenue stream which they generated. As a result, a concessionaire who operated a toll road, for example, might also be granted the right to develop commercial property along the road.

42. Lastly, the example of "local telephone companies", which was cited in paragraph 62 as an illustration of a market dominated by one enterprise, might more accurately be replaced by "power generators".

43. Mr. WALLACE (United States of America) said that the awarding authority should formulate clear criteria for evaluating proposals not only during the selection phase but also during the longer-term operational phase.

The meeting was suspended at 4.25 p.m. and resumed at 5 p.m.

Paragraphs 66-74

44. Mr. WALLACE (United States of America) said that legislative recommendation 12 appeared to suggest that the bidder should supply the items listed in the recommendation when in fact governments should include those items

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in the request for proposals. The recommendation should therefore be reworded for clarity.

45. He believed that in legislative recommendation 13, an additional item should be included: the financial commitments of the bidder - whether the bidder had discussed the project with its bankers and was in possession of letters of intent or other indication that financing was available - should be included in requests for proposals.

46. Turning to related paragraphs 66 to 69, he suggested that mention should be made of the phrase "best and final offer", which was well known to those involved with procurement.

47. Paragraph 68 included disclosure provisions for bidders, of which not all might be acceptable to those bidders. The provision in subparagraph (c) on disclosure of bidders' internal rates of return would be particularly troublesome.

48. Paragraph 73 recommended that for evaluation criteria awarding authorities should not limit themselves to comparisons of unit prices. Perhaps not enough emphasis had been given to alternatives: while the unit price approach might generally be the right tack to take, there were occasions when it would be foolish.

49. Ms. GUREYEVA (Russian Federation) said that she could not fully concur with the previous speaker, first on his point that recommendation 12 and paragraph 76 contained items that should be laid down by governments rather than provided by companies: indeed, the "specifications and schedule of works" referred to in recommendation 12 (a) could serve as criteria for governments to select which bidder they preferred.

50. Second, although it was quite true that some companies might be unwilling to disclose their internal rates of return, what was actually needed was a system for protecting the confidentiality of information, including price information. In the absence of such price information, governments could hardly come to adequate decisions on projects.

51. Mr. GUISLAIN (Observer for the World Bank) said that he concurred with the representative of the United States in respect of recommendation 12 and paragraph 66: greater clarity was indeed needed. Also, to continue the Bank's consistent emphasis on the service provided, rather than the works carried out, the list of items to be included in technical proposals should include roll-out of services and performance standards, which included but were not restricted to quality standards.

52. He concurred with the representative of the United States also in respect of paragraph 68 (c) on the issue of disclosure of internal rates of return. Disclosure of rates of return might be appropriate in some circumstances, but one had to know to what effect governments would use such information: it might be legitimate to require disclosure if the purpose was to ensure that the bidder had done his homework, but if it was, as many countries found tempting, to determine whether the rates were too high, that would be unacceptable.

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especially in a competitive bidding situation: it was irrelevant whether a bidder managed to make a large profit as long as the bid was the best.

53. He believed that before the subject of evaluation criteria was broached, in paragraphs 72 to 74, the text should first tackle qualification criteria, as in paragraphs 76 and, obliquely, 77, either under a separate sub-heading or by changing the heading "evaluation criteria" to "qualification and evaluation criteria". After all, there was no point in evaluating the proposals of firms that did not meet the qualification criteria.

54. Also, it might be advisable to extend the list of qualification criteria, and in that respect he disagreed with the representative of the United States: selecting a bidder on the basis of the lowest tariff offered was a valid procedure, it being understood that the other performance criteria must be clearly set. The aim of any project was to provide the best service at the lowest price, and unit price was the standard method of selection, and even the sole one in the power industry. In such circumstances, it became more important to get the pre-qualification and qualification criteria right.

55. Mr. LALLIOT (France) said that in the specific context of the paragraphs under discussion and also generally, a clear distinction should be drawn between the negotiation and discussion phase, where the broad technical, commercial and financial parameters were set, and the final stage of contract negotiations between the future parties to the contract - the procuring entity and the successful bidder.

56. Bidders had to be selected on the basis of objective criteria in their bids; in that connection, he supported those speakers who had mentioned the need for technical, commercial and financial confidentiality in respect of bids. Also, if the text under discussion were to require too much disclosure from bidders during the discussion and negotiation phase, excess publicity was always a risk and one that would put potential bidders off bidding.

57. In the final version of the text under discussion, in addition to the distinction between the discussion and the final negotiation stages, care must be taken not to give the impression that contracts were negotiated pre-selection.

58. He noted that European Union Directive 93/37/EEC concerning the coordination of procedures for the award of public works contracts made the distinctions he had drawn very clear. The model notice of public works concession and other related model notices drawn up under that directive were more expeditious than the text before the Commission and maintained the discretionary room for manoeuvre in the negotiations that was needed for the important reasons of confidentiality, efficiency and security.

59. Turning to the issue of the unit price criterion as discussed by the Observer for the World Bank, he said that some contracts could not be awarded on a unit-price basis, which point must be made more clearly and firmly than it was in the text under discussion: there were parameters that had to do with the public interest, quality and equality of access and the like that must have a

bearing on procurement and the award of contracts, making it simplistic to rely solely on the unit price.

60. Mr. MARADIAGA (Honduras), referring to paragraph 68 (c) on financial viability, said that the expected financial internal rate of return, when fixed directly by the State or determined on the basis of legal provisions, might have an impact on the price set in the contract. That should be taken into account. The language of paragraph 70 on tender securities should be more positive.

61. As a newer member of the Commission, his delegation would appreciate having access to all UNCITRAL documentation.

62. Ms. FOLLIOT (France) requested an explanation of the relationship between the final sentence of paragraph 72, concerning pre-qualification criteria, and the final sentence of paragraph 60.

63. Mr. ESTRELLA FARIA (International Trade Law Branch) said that the intent of the final sentence of paragraph 72 was to ensure that an evaluation of pre-qualification criteria whose results had been positive would not be repeated in the final stage of selection.

Paragraphs 75-80

64. Mr. ENIE (Observer for Gabon), referring to the first sentence of paragraph 75, said that it should be sufficient to specify the date of the opening of proposals without going into detail about the time.

65. Mr. ESTRELLA FARIA (International Trade Law Branch) said that the reference to time was based on the provisions of article 33 of the UNCITRAL Model Law. It was designed to protect and preserve confidentiality and reassure consortia that nothing in their proposals would be changed until such time as the proposal was publicly opened in the presence of their representatives. Specifying only the date was not sufficient, since it could conceivably permit the opening of proposals before the actual time at which the representatives of the consortia were present.

66. Mr. WALLACE (United States of America) said that the secretariat should think about the remarks made by the Observer for Gabon; in the context of the procurement of services, the examination of proposals upon the opening of bids was probably not thorough. Referring to paragraph 76, he asked whether bids could be rejected on the grounds that they were not prima facie responsive in the first stage as well as the second stage; in some cases, it might be clear from the outset that bids did not meet that criterion. He wondered how strictly the separate consideration of price and non-price factors (para. 77) would be adhered to. Lastly, with regard to the second sentence of paragraph 77, he said that selection criteria must be made clear in requests for proposals; they should not be left to the discretion of the awarding authority.

67. Mr. GUISLAIN (Observer for the World Bank) said that the pre-qualification criteria referred to in paragraph 72 were often reapplied in the second stage in order to ensure that the consortium had not undergone major changes. Referring to paragraph 76, he said that "incomplete" and "partial" were not the sole

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determinants of unresponsiveness; a proposal would also be unresponsive if it was in direct contradiction with some of the specifications of the request.

68. He had never said that all contracts should be awarded on a lowest-price basis. Rather he had merely indicated that certain contracts, such as those for the production of electricity, were typically awarded on that basis. That factor was taken into account in paragraph 77 but not in paragraph 73. The opening of proposals described in paragraph 75 was a key element of transparency and, therefore, absolutely necessary. Since all bids must be opened at the same time and in the same place, it was vital to specify both the date and the hour. The examination upon opening was not thoroughgoing but rather a formal verification that all required documents had been submitted. The words "or consumers" should be added after "to the detriment of the host Government ..." in paragraph 78. Lastly, the wording of paragraph 80 (g) should be sufficiently broad to convey that the awarding authority was not necessarily the one to monitor the contract in every case. "Monitoring rights of the Government" might be a more appropriate phrase.

69. Mr. LAMBERTZ (Observer for Sweden) said that he supported the remarks made by the representative of the United States. Perhaps the first sentences of both recommendation 17 and paragraph 77 should be added to the text of recommendation 16 on opening, comparison and evaluation of proposals, which was supposed to constitute legislative advice. It might also be useful to develop the recommendation on the basis of the UNCITRAL Model Law, particularly article 34 on successful tender.

The meeting rose at 6 p.m.

UNITED
NATIONS

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General Assembly

Distr.
GENERAL

A/CN.9/SR.640
17 May 1999

ORIGINAL: ENGLISH

UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Thirty-first session

SUMMARY RECORD OF THE 640th MEETING

Held at Headquarters, New York,
on Friday, 5 June 1998, at 10 a.m.

Chairman: Mr. MAZILU (Romania)

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PRIVATELY FINANCED INFRASTRUCTURE PROJECTS (continued)

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98-80757 (E)

The meeting was called to order at 10.15 a.m.

PRIVATELY FINANCED INFRASTRUCTURE PROJECTS: continued (A/CN.9/444/Add.4 and Add.5)

1. The CHAIRMAN invited the Commission to resume its consideration of draft chapter III of the legislative guide on privately financed infrastructure projects (A/CN.9/444/Add.4).

Paragraphs 76-82

2. Mr. LALIVE (France) said that his previous comments on the distinction between procurement and public service delegation also applied to the recommendations and notes under consideration, which sought to adapt the provisions of the UNCITRAL Model Law on Procurement of Goods, Construction and Services to privately financed infrastructure projects. Accordingly, the text emphasized the importance of price as a criterion for the award of contracts. However, under French and European law, the concept of price related primarily to procurement, whereas public service delegation agreements specified the financial terms of payments to be provided to the contractor. Such payments were usually financed, at least in part, by fees charged to the users of the works or services, as in the case of toll roads. Financial and payment terms were important selection criteria, since they affected both the users and the two parties to the contract, and the quality and continuity of the service provided and equality of access to them were equally important parameters.

3. Paragraphs 76 and 79 of the notes were surprisingly brief, considering the fact that they dealt with the way in which the two parties negotiated the terms of the contract. The system described in draft chapter III emphasized the selection process, whereas French and European law tended to shift the emphasis to the final negotiation phase. As conditions varied in different countries, he could accept that change of emphasis. However, it was important to eliminate any implication that contractual terms could be negotiated in any way during the selection process. In particular, paragraph 79 of the notes should refer only to technical and financial terms and not to contractual terms.

4. Mr. NIELSEN (Denmark), referring to item 4 of the agenda, said that the last sentence of paragraph 79 did not seem to provide any useful guidance. It was clear that the awarding entity would engage in discussions with any project consortium with which they had already been terminated unless there were sound reasons for doing so, in which case the law or regulations governing such negotiations would not be respected.

5. Mr. WALLACE (United States of America), replying to the representative of France, noted that draft chapter III clearly implied that contractual terms would be included in some form in the list of requirements for proposals. Following the initial response, the project authority, including contractual terms, would be prepared or refined by the preferred entity and then refined at a subsequent stage. If contractual documents were provided to bidders along with technical and financial documents, fairly negotiations would be required in the final phase and the entire process would be expedited. If countries

accepted the selection model described in the legislative guide, they would have to adjust their methods accordingly.

6. With respect to the last sentence of paragraph 79, he noted that it applied only to unsuccessful bidders; it did not say that negotiations should not be reopened with the successful bidder, and was therefore consistent with the UNCITRAL Model Law on Procurement of Goods, Construction and Services.

7. Mr. CHOUKRI (Observer for Morocco) said, with respect to paragraph 80 of the notes, that the notice of project award was very important for ensuring transparency in the host Government's relations with the private-sector contractor and with the general public. Accordingly, the price of the proposal should be mentioned in the notice.

8. Mr. ESTRELLA FARIA (International Trade Law Branch) drew attention to the text in brackets following paragraph 77 of the notes, which acknowledged that the notion of "price" under traditional public procurement systems might not be fully applicable to the selection procedure being proposed. Instead, countries might focus on how payment to the contractor was to be effected.

9. Mr. GILL (India) pointed out that, after a request for proposals had been issued, changes in a country's political situation or other circumstances might prevent the Government from opening the bids. He asked whether the legislative guide would include information on the procedures to be followed in such cases.

10. Mr. ESTRELLA FARIA (International Trade Law Branch) said that the legislative guide had not been intended to be so detailed as to specify what States should do when a procurement exercise was cancelled for some reason. In such cases, States would have to refer to the general procurement regime.

11. Mr. LALLIOT (France) said that he understood the importance of financial terms in the award of contracts, but that other parameters should be considered as well and should reflect the nature of the contract in question. With respect to the comment made by the representative of the United States, the proposal of a lengthy preselection process and a short final negotiation phase was only one of several possible approaches to developing an effective procedure for the award of contracts; shifting the emphasis from one phase to another would not necessarily change the time required for the completion of the entire process.

12. Mr. CHOUKRI (Observer for Morocco) agreed with the representative of France that price should not be the only criterion for the award of contracts. Quality and efficiency were also important criteria.

Paragraphs 81-93

13. Mr. WALLACE (United States of America) drew attention to paragraph 85 of the notes and questioned whether it was realistic to expect that private financing modalities would be used for projects that were urgent or of short duration. Such modalities were normally used in relation to larger projects for which the negotiations themselves took a long time. Moreover, in referring to "direct negotiations", the text did not specify whether such negotiations would involve informal competition or no competition at all.

14. Paragraphs 87 to 93 of the notes provided suggestions concerning the difficult problem of how to respond to sole-source proposals in an encouraging manner without abandoning competition. However, the solutions proposed were not ideal. With respect to recommendation 24, he asked whether it was assumed that a company which submitted an unsolicited proposal should have met some minimum qualification requirements. He also asked whether the paragraphs on unsolicited proposals excluded the possibility of sole-source procurement.

15. Mr. GUISLAIN (Observer for the World Bank) said he would prefer to substitute "allowed" for "encouraged ... whenever possible" in the first sentence of paragraph 82. In paragraph 83, it should be made clear whether the negotiations in question were being conducted with a single provider or whether they were parallel negotiations with a number of different providers. The last sentence of paragraph 83 was not necessarily correct: where an awarding authority chose to engage in comparative negotiations, it was usually because it was not entirely certain what was wanted from the project and was willing to consider a broad range of proposals. For example, if the project involved the construction of a road, different proposals might be submitted for different routes. In such cases the criterion for selection would rarely be price alone, since the awarding authority would be choosing among different packages.

16. In practice, there were many different methods of procurement, and the Commission should not confine itself to a single model. However, some safeguards should be suggested for cases in which Governments had opted for a sole-sourcing approach or for direct negotiations. Clear objectives should be set for performance and outputs, and there should be precise qualification criteria; water supply, for example, must meet international standards. In order to ascertain whether proposals met those standards, awarding authorities conducting direct negotiations must have excellent advisers.

17. Commenting on paragraphs 85 and 86 (Circumstances authorizing the use of direct negotiations), he suggested that the law should contain a rule that competitive tendering should be the standard practice, with exceptions allowable only by a higher authority, as under a presidential decree or a cabinet decision. Paragraph 85 (a), which pertained to legislative recommendation 20 (a), was not workable as it stood: even if an emergency situation, such as a breakdown in power supply, was the fault of the awarding authority, failure to intervene was not justifiable. Another situation justifying direct negotiations might be a lack of experience in privately financed infrastructure projects or a lack of capacity to launch the tendering process. In such cases, private companies might well be in a position to play an advisory role vis-à-vis the Government.

18. Ms. MUSOLINO (Australia), referring to recommendation 23, said it would be desirable to indicate roughly what length of time was meant by the phrase "a minimum number of years". It should also be specified that the company which submitted the original proposal should be invited as part of a competitive selection procedure.

19. Ms. ALLEN (United Kingdom) said she wished to add to the list of circumstances warranting direct negotiations a situation in which there was only

one feasible source of supply, perhaps for artistic or intellectual property reasons.

20. Mr. LALLIOT (France) suggested a further addition. The emergency situations mentioned by the representative of the United States included cases where the concessionaire, having qualified through a pre-selection procedure, failed to perform the works and had to be replaced. He agreed with the representative of the United Kingdom that there were other situations such as those involving products subject to a licence or patent held by a single supplier. A third set of circumstances justifying direct negotiations might be defence contracts or contracts for works with secrecy implications where the higher interests of the State had to be protected. Such cases were already provided for in French and European law.

21. Mr. LAMBERTZ (Observer for Sweden) reiterated that it was not the Commission's role to recommend that Governments should opt for competition rather than direct negotiations, at least not in a legislative guide. If that was the Commission's view, it should be framed in more neutral language, and should not be reflected in the recommendations. The statements in recommendations 20 and 21 did not constitute legislative advice, and should appear only in the commentary. He agreed with the observer for the World Bank that the provision in recommendation 20 (a) was unworkable as it stood.

22. He further agreed with the observer for the World Bank that unsolicited proposals must meet precise quality standards. However, recommendations 22, 23 and 24 were not legislative statements and should not be included in the recommendations. In Sweden, it would be impossible to legislate along the lines suggested in recommendation 23; the advice contained there should therefore be moved to the commentary and given less prominence. The recommendations in general had more to do with fairness and common sense than with legislative action.

23. Mr. LIU Yang (China) could not agree that certain recommendations should be dropped or moved to the commentary. The Secretariat had thoroughly considered the various problems that might arise with direct negotiations, such as a lack of transparency or abuses of government authority. The recommendations were sound and could be very useful in drafting future legislation in China. The ultimate purpose of preferring competitive selection to direct negotiations was to secure greater openness and transparency of procedures among private enterprises working in the public sector. That was fully consistent with the direction currently being taken in China.

24. With regard to the financing of projects, it was often the case that proposals were not made between the Government and the consortia bidding for a project, but were instead generated in direct negotiations - in other words, they were unsolicited proposals. To guard against the possibility of abuse in such negotiations, paragraph 85 might mention the host country's rules on emergency situations and the need for openness and transparency.

25. In the section dealing with unsolicited proposals (paras. 87-89) it should be made clear that the party negotiating with private enterprises on behalf of the Government might itself be a business entity authorized to do so by the

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Government. Accordingly, the term "host Government" in paragraph 87 should perhaps be altered to read "government authorities".

26. Mr. OLIVENCIA RUIZ (Spain), referring to the remarks of the observer for Sweden, said that the tone of the recommendations varied somewhat and might therefore prove disorienting to legislators. Recommendation 1 stated that it was advisable to devise a method promoting competition, yet the language used in recommendation 20 to advise against direct negotiations was quite peremptory, at least in the Spanish version, which used the verb "deber". His delegation considered such a tone to be inappropriate. The proposals in the draft guide were not normative ones, to be incorporated into domestic legislation and adapted if necessary; they were a set of rules of conduct, in which imperative statements should be avoided. The guide should state merely what was advisable and rational. It should make clear that there was a preference for competitive procedures and briefly state the grounds on which exceptions would be justified, such as emergency and cost, leaving them open to debate and review. As for the transparency requirement, it applied to all circumstances, even exceptional ones.

27. Mr. MARKUS (Observer for Switzerland) agreed with the representative of Spain. The recommendations were framed in terms of policy, and the examples given in paragraph 85 of circumstances authorizing the use of direct negotiations were not very well chosen. The representative of the United States had suggested adding cases in which a State had no experience of privately financed infrastructure projects. However, the aim of the Commission's work was to show Governments how to handle such projects, thus completing work begun by the United Nations Industrial Development Organization (UNIDO). A reference to lack of experience might simply be used as an excuse for resorting to direct negotiations. It was of course true, as the representative of the United Kingdom had said, that in cases involving intellectual property rights there might be no choice to exercise.

28. Mr. WALLACE (United States of America) said he agreed with the representative of Spain that model provisions were not meant to be advisory; Governments clearly had the choice of accepting or rejecting them. As currently drafted, however, the recommendations appeared to take the form of instructions to Governments.

29. With regard to paragraph 85, it was important to make a distinction between procurement policy and its application to privately financed infrastructure projects. The Model Law also addressed the question of urgency and the need to provide explanations for following exceptional selection procedures. It was unclear, however, whether direct negotiation meant negotiations with just one party or with several. It was also unlikely that in an emergency private funding would be sought for such projects. Considerations of national security were also explicitly provided for in the Model Law, but again, it was unlikely that private financing would be sought in a matter involving national security.

30. Mr. ESTRELLA FARIA (International Trade Law Branch) said that the language of the recommendations might seem prescriptive because of the difficulty in finding a translation of "should", which carried the same weight in French and Spanish as in English. To clarify the point raised by the representative of

China, the authority awarding the project had competence over running that public service. With regard to the views expressed on paragraph 85 (a), it was unlikely that urgency would be invoked in order to build new infrastructure, but rather to maintain continuity and prevent a service from being interrupted. The second sentence of that paragraph was intended to address a situation where a public authority knew that a service had been interrupted but invoked urgency in order to avoid the accepted selection procedures.

31. Ms. ALLEN (United Kingdom) said that it had been suggested that using the term "should" softened the language of the draft, but in her view it was actually quite a strong term.

32. Ms. POLLICOT (France) said that, with regard to direct negotiations, it might be simpler just to refer to article 51 of the Model Law.

The meeting was suspended at 11.45 a.m. and resumed at 12.15 p.m.

Paragraphs 94-99

33. Mr. WALLACE (United States of America) suggested that an additional recommendation could be added dealing with the review procedure discussed in paragraph 94. The paragraphs on the record of selection proceedings should also make clear the need to preserve the confidentiality of proprietary information, something that had been done in the Model Law.

34. Ms. MOSCOLINO (Australia), referring to the final bracketed paragraph in italics, said that it would be sufficient to refer to the relevant privacy and freedom-of-information legislation in each country.

35. Mr. CHOUKRI (Observer for Morocco) said that the usefulness of certification for unsolicited proposals (para. 99 (b)) was not clear to him. He requested clarification of its effect on the position of the investor and its potential legal implications. He also wondered whether such certification was merely a formality or whether it had a substantive purpose.

36. Mr. ESTRELLA FARIA (International Trade Law Branch) said that paragraph 99 (b) had been inspired by national legislation on unsolicited proposals. Its purpose was to provide internal accountability for host Governments. The question of its legal effects, however, exceeded the scope of the legislative guide and would have to be settled under the rules of the host country.

37. Mr. GUILLAIN (Observer for the World Bank) said that, in addition to the information listed in paragraph 98, it would be useful to include the qualifications of the company and benchmarks from the awarding authority. Those elements could also be incorporated into paragraph 99. The text in italics should be expanded to cover publicity and should distinguish clearly between the kinds of information that should be made available and the kinds that should not.

38. The CHAIRMAN said that it was his understanding that the text of document A/CN.9/444/Add.4, as amended, could be accepted. He then invited the Commission to consider draft chapter IV of the legislative guide (A/CN.9/444/Add.5).

Paragraphs 1-14

39. Mr. WALLACE (United States of America) pointed out that it would not be wise for the legislative guide to suggest that legislation should establish the terms of a project agreement. The purpose of legislation was to remove obstacles to the conclusion of such agreements. The method varied from country to country: in some countries, a single agreement sufficed, while other countries required several. Governments should retain the freedom to conclude any agreements that might be necessary. The final sentence of paragraph 2 described a legislative approach that was followed in some countries; however, the Commission should not appear to suggest that it was a good one.

40. The final sentence of paragraph 5 acknowledged that the entry into force of project agreements sometimes required an act of law. In his delegation's view, the legislative guide should suggest models under which it would not be necessary to seek parliamentary approval for each project agreement. Furthermore, paragraphs 5 and 6 should recommend that legislation should clearly specify who had the power to award a contract and who had the power to sign an agreement. The process should be as simple as possible, in order to avoid delays and abuses.

41. Mr. LAMBERTZ (Observer for Sweden) said that recommendation 1 seemed to suggest that the Commission was proposing that Governments should not enact legislation regarding contract law. The legislative guide should in fact recommend the establishment of provisions that would give useful guidance to the contracting parties. The purpose of paragraph 2 was to indicate that a Government should not impose specific laws concerning the content of the project agreement, and the paragraph should be reworded to convey that idea. It might be useful to employ wording of the kind used in paragraph 4: "Therefore it is advisable to limit the scope of legislative provisions concerning the project agreement to those strictly necessary." In recommendation 2, the words "to have simple procedures" should replace "to simplify procedures".

42. Mr. LALLIOT (France) said that the text was both too prescriptive and too descriptive. The objective of the guide was to present a range of options, and their advantages and disadvantages, and to indicate which options were preferable. Governments were then free to establish their own practices.

43. Replying to the representative of the United States, he said that an act of parliament was sometimes necessary for the approval of a project agreement; that possibility should be allowed to stand. In order to construct the Eurotunnel, for example, France had concluded an international agreement with the United Kingdom, for which, under the terms of the French Constitution, the Government had been required to seek the approval of Parliament. When it had become necessary to modify the terms of the original agreement, parliamentary approval had again been sought. As unusual as such cases might be, that possibility must be allowed to remain.

44. Ms. NIKINJAM (Islamic Republic of Iran) said that under the Iranian Constitution, Parliament was required to approve all international agreements. Since a privately financed infrastructure project was an agreement between the Government and a foreign company, it could be considered to be an international agreement; the approval process would therefore be long and cumbersome. In her delegation's view, the legislative guide should suggest the possibility of amending such constitutional provisions to exempt agreements with private foreign companies.

45. Mr. GUISLAIN (Observer for the World Bank) suggested that the final sentence of paragraph 5 of the notes should simply be dropped: some countries required parliamentary approval of project agreements, and the Commission could not proscribe that approach. And yet, examining the terms of a contract was not inherently a legislative activity, and often occasioned lengthy delays. Furthermore, in some countries, such projects simply called for licences. Licences, however, sometimes had to be negotiated as well. What the guide termed "the project agreement" could in fact be many agreements; the guide should perhaps reflect that fact.

46. Paragraph 5 was crucial, and called for further consideration. In some countries, major delays in the completion of project ag.eements had arisen from the failure of legislation to specify clearly what parties were authorized to act - for example, who could launch a tender for a privately financed infrastructure project, who could negotiate, who could participate in an awarding committee and who was authorized to sign a contract. The legislative guide should recommend that legislation should specifically address such points.

47. Lastly, the term "host Governments" should not be seen as including local Governments. When local author'ties concluded contracts for privately financed infrastructure projects, they often had to seek the approval of other levels of Government, and such requirements varied from country to country. That was a matter that should be addressed in the guide, whether in the section under consideration or elsewhere.

48. Mr. GILL (India) said that it was of course very difficult to obtain parliamentary approval for a project agreement. In his delegation's view, there were two possible approaches: the guide could set out model procedures for the signature of an agreement by a legislature, or else suggest that under certain circumstances project agreements could be approved and signed only by the executive power.

49. Mr. LALLIOT (France) said that a legislative guide could not purport to address the distribution of powers among the legislative and executive branches of sovereign States. The final sentence of paragraph 5 clearly stated that it was the entry into force of the project agreement that was subject to parliamentary approval. That did not mean that parliament was empowered to pronounce with regard to the content of the contract. Parliament could accept or reject entry into force, but it could not modify the contract's terms. Such an approach made sense because it was the contracting parties that established the terms of the contract; it also prevented delays in the start of the project. Accordingly, the sentence in question should stand.

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50. Mr. CHOUKRI (Observer for Morocco) said that the approval of project agreements relating to financed infrastructure projects should rest with the executive power, not with the legislature. The sentence should be redrafted to read: "Sometimes the entry into force of the project agreement depends on the enactment of a special law", thus removing the words "parliamentary act", which created unnecessary confusion. The guide should also indicate that parliament had the right to ask the Government for information. That should not, however, affect the launching of projects approved and signed by the executive power.

51. Mr. MARADIAGA (Honduras) said that the guide called for transparency in the establishment of privately financed infrastructure projects; the process should in effect be as rapid and dynamic as the market itself. When, however, such project agreements were subject to approval by legislatures, the process was often long and tedious. It was therefore crucial that the guide should establish a process that would guarantee promptness and transparency.

The meeting rose at 1 p.m.